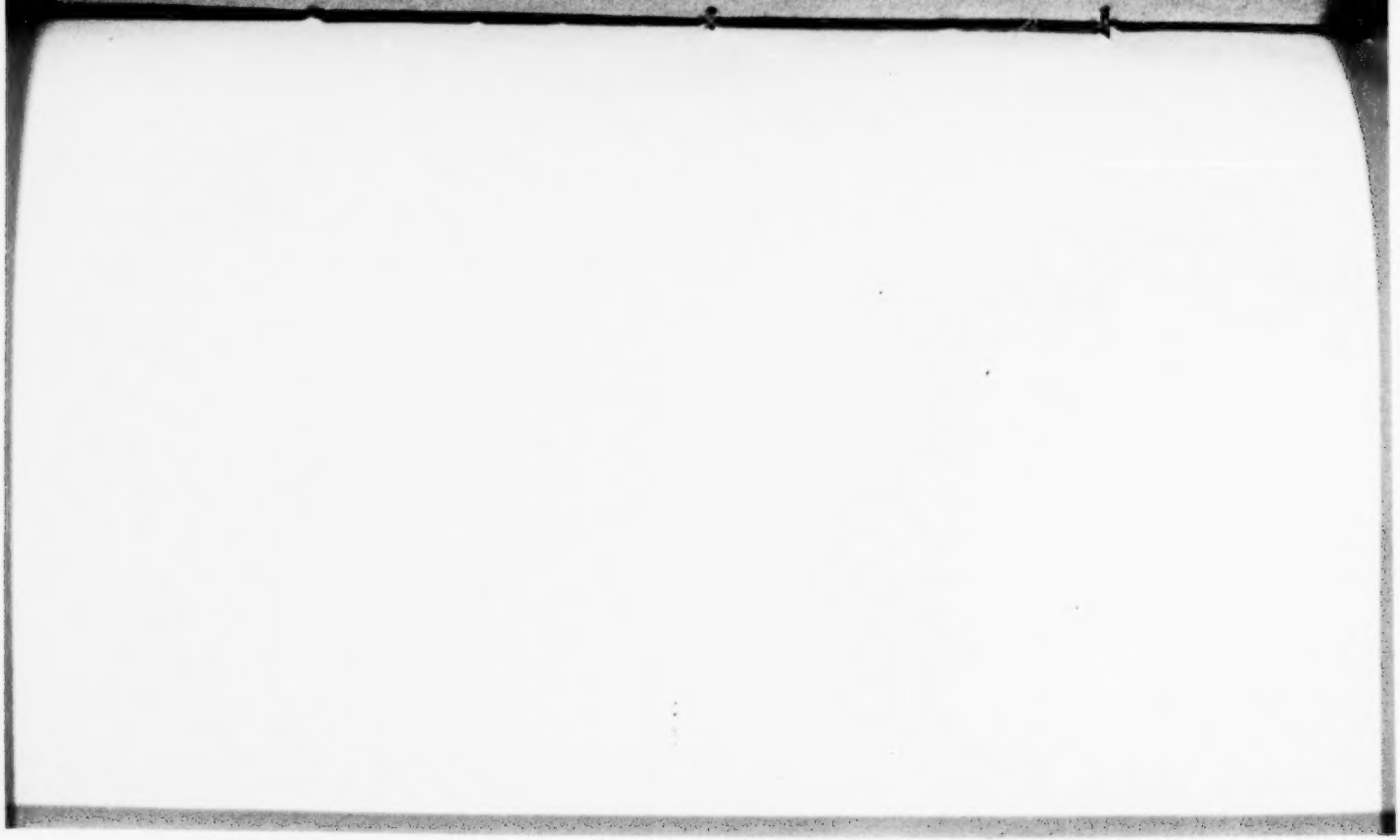

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1902~~ 1903.

No. ~~194~~ 153.

THE WINOUS POINT SHOOTING CLUB, PLAINTIFF IN ERROR,

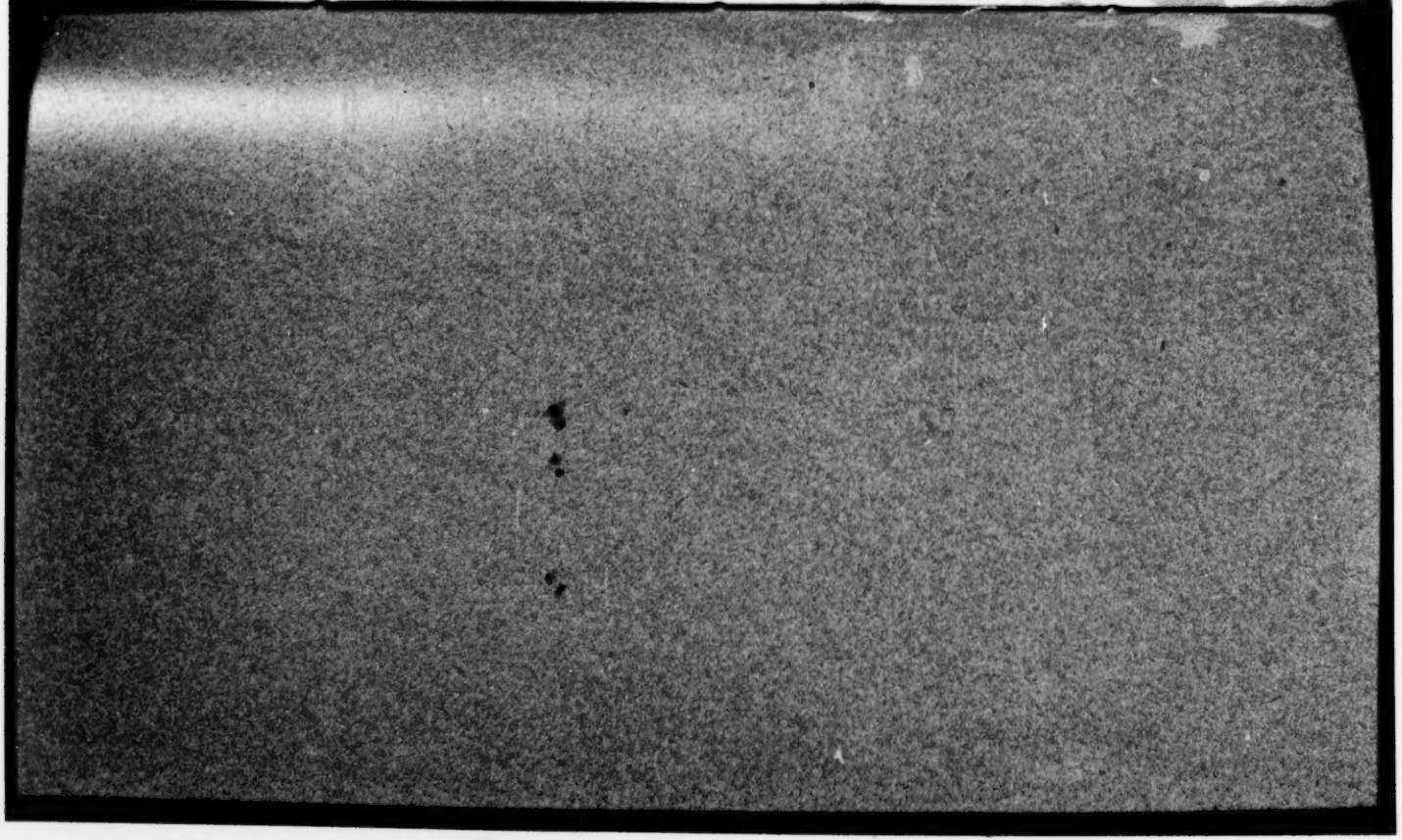
vs.

JEPPE CASPERSEN, PETER PETERSEN, WILLIAM DECKER, AND CHARLES PETERSEN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED NOVEMBER 1, 1902.

(18,722.)



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(18,722.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902

No. 494.

THE WINOUS POINT SHOOTING CLUB, PLAINTIFF IN ERROR,

vs.

JEPPE CASPERSEN, PETER PETERSEN, WILLIAM DECKER, AND CHARLES PETERSEN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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In the Supreme Court of Ohio.

The Winous Point Shooting Club, Plaintiff in Error, v. Jeppe Caspersen, Peter Petersen, Wm. Decker and Charles Petersen, Defendants in Error.	No. 7167.

PETITION IN ERROR.

Now comes the plaintiff in error and says that at the December term, 1899, to-wit, March 9, 1900, of the Circuit Court of Ottawa county, Ohio, the defendants in error, by the consideration of said court, recovered a judgment against the plaintiff in error in a certain action then pending in said court, wherein said plaintiff in error was plaintiff and said defendants in error were defendants.

An authenticated transcript of the docket and journal entries and final judgment rendered in said cause, together with the original pleadings, papers and bill of exceptions therein are herewith filed and made a part of this petition in error.

The plaintiff in error avers that there are errors to its prejudice in said proceedings, record and judgment in this, to-wit :

First. The conclusions of facts made by the court are not supported by and are contrary to the evidence.

Second. The conclusions of law are not supported by the evidence or the conclusions of facts and are contrary to law.

Third. The court erred in overruling the motion for new trial made by the plaintiff below.

Fourth. The judgment of the court is contrary to law.

Fifth. The judgment of the court should have been for the plaintiff below instead of the defendants.

Sixth. The judgment of the court is in contravention of Section 19, Article 1, of the Constitution of Ohio, and Article 5 of the Constitution of the United States, in that by said judgment the private property of the plaintiff in error is taken for public use without just compensation.

Seventh. For other manifest errors appearing upon the face of the record prejudicial to this plaintiff in error.

Wherefore the plaintiff in error prays that the said judgment of the Circuit Court may be reversed and that it may be restored to all things lost by reason thereof; that the defendants in error be perpetually enjoined, as prayed for in the petition filed herein.

GOULDER, HOLDING & MASTEN,
LOVE & WIERMAN,
BARTLETT & WILSON,
Attorneys for Plaintiff in Error.

WAIVER OF SUMMONS.

Now come the defendants in error above named and waive the issue and service of summons in error in the above entitled action, and enter their appearance herein.

GEO. A. TRUE,
Attorney for Defendants in Error.

In the Supreme Court of Ohio.

THE WINOUS POINT SHOOTING CLUB, Plaintiff in Error,
vs.
JEPPE CASPERSEN, PETER PETERSEN, WM. DECKER, and Charles Petersen, Defendants in Error.
No. 7167.

Amendment to Petition in Error.

Now comes the plaintiff in error, and, by leave of court first had and obtained, files this its amendment to the petition in error filed herein, and avers that the amount involved in the judgment herein, which is sought to be reversed, exclusive of interest and costs, is of the sum or value of more than three hundred ($300) dollars.

GOULDER, HOLDING & MASTEN,
LOVE & WIERMAN,
BARTLETT & WILSON,
Attorneys for Plaintiff in Error.

Filed Jan. 2, 1902, in supreme court of Ohio.

J. B. ALLEN, *Clerk.*

IN THE COURT OF COMMOM PLEAS, OTTAWA COUNTY, OHIO.

The Winous Point Shooting Club,
Plaintiff,

v.

Jeppe Caspersen, Peter Petersen, Wm. Decker and Charles Petersen,
Defendants.

PETITION.

The plaintiff is a corporation duly created and existing under the laws of Ohio for the purposes, among others, of hunting, fishing, the protection of fish and game, and lawful sporting, and in furtherance of the aforesaid purposes has, at a large outlay purchased and acquired and is the owner in possession of a large tract of lands, situated in Ottawa and Sandusky counties in the state of Ohio, to-wit: All the lands covered by the waters and all the waters of Mud Creek, Mud Creek Bay, and so much of South Creek and Sandusky River and its mouths as lie within and below Section 27 and the north three-fourths of section 34 hereinafter described, and all the arms, inlets, and indentations of said waters, and all the islands therein from Bixler's Point on the west to Slate's or Slade's Point and the east end of Eagle Island on the east, subject only to the public easement of navigation; and all the shores and marsh lands in Bay township, Ottawa county, Ohio, bordering upon said waters, including Sections 24, 23, the south half and the south half of the north half of Section 22, and the southeast quarter and the southeast quarter of the northeast quarter and the southwest quarter of the northwest quarter of Section 21, also including all the shores and marsh lands in

Sandusky county bordering upon said waters between said eastern and western limits on the south and extending down to Sandusky Bay and included within Sections 25, 26, 27, 28, 34, and 35, in Sandusky county, all the sections aforesaid being in township 6, north, range 16, east.

Sandusky River is a navigable river emptying into Sandusky Bay and Mud Ceeek is a navigable stream flowing at said points nearly due east and empyting into Sandusky River about one and one-fourth miles from its mouth, between a point called Squaw Island on the south and Winous Point on the north, and where said creek widens out near its outlet in Sandusky River it is locally known as Mud Creek Bay.

Said lands of the plaintiff are marsh lands in large part covered with water and are wholly unsuited for agricultural purposes but are well adapted for hunting, fishing, and the harboring and protection of fish and game, and during the spring and autumn of each year are the resort of large quanties of wild ducks, wild geese, and other wild game, and said marshes are the breeding grounds of wild ducks, frogs, turtles, and other wild game, and the waters thereof contain large quantities of fish fit for food and adapted to the sport of angling, and contain large quantities of turtles fit for food, and said lands derive their chief value from their adaptation to the sports of hunting and fishing, and to the harboring and protection of fish, ducks, geese, frogs, turtles, and other wild game, and from their being breeding grounds for fish, ducks, frogs, and other wild game; and to further adapt them to the purposes aforesaid the plaintiff has placed in said waters large quantities of fish known as German carp, being fish suitable for game and food, and has built a club house and a boat house and has made other improvements on said premises at an expense and outlay of over $25,000, and during the spring and

autumn of each year, when the fish and game laws of the state of Ohio permit the catching of fish and the shooting of game, the members of said corporation are accustomed to resort to said premises to hunt and fish thereon in such manner and to such extent and at such times as to duly protect such fish and game while deriving reasonable sport in the pursuit thereof.

And plaintiff says the defendants claim some estate or interest in the aforesaid premises adverse to the plaintiff's right, of the exact nature and extent of which plaintiff is uninformed, but they claim the right to fish in said waters upon said premises at will, with pounds, seines, and other fish nets, and to drive stakes in the soil under said waters and to place and keep the same upon said premises and to catch and remove fish and turtles from said waters, and to pursue and capture frogs in said marshes and from said waters, and to pursue and capture frogs in said marshes and from said waters, and are now asserting their said pretended right and claim, and are fishing in said waters with seines and fish nets and devices for catching fish, and are taking and removing from said marshes frogs and turtles and other wild game, and they and their agents, servants, and employees have been and are engaged in catching and removing and they do catch and remove from said waters great quantities of fish, turtles, frogs and other wild game.

And plaintiff says that the defendants, their agents, servants and employees, in their said occupation of fishing and of pursuing and capturing frogs, turtles and other game, destroy and have destroyed the feeding and breeding grounds of said wild game and scare and drive away and have scared and have driven away game from said premises, and have destroyed and removed great quantities of fish and turtles from said waters, and have destroyed and removed great numbers of

frogs from said marshes, and said acts, if persisted in will permanently drive away and destroy the fish and game upon said premises and will render said premises unsuitable for hunting and fishing and for harboring and protecting fish, frogs, turtles, and other wild game, to the lasting and irreparable injury of said premises and the great depreciation of the value thereof.

And plaintiff says the defendants threaten to continue, with seines and other nets and devices for catching fish, to catch and remove fish and turtles from said waters, and with flash lights and other devices to catch and remove frogs from said marshes and to destroy and injure the feeding and breeding places of said wild game and to scare and drive away the same from the said premises and to obstruct the waters thereof with their said nets during the whole shooting season of this year, and plaintiff has no adequate remedy at law for such wrongs and injuries for the reason that it is impracticable to make full and accurate proof to a jury of the amount of its damages, and because the same are a permanent injury to the plaintiff's premises, and are of a continuous and constantly recurring nature, and defendants' interest and pretended estate in said premises and their assertion of the right to fish thereon and to use and to enter and remain thereon for the purpose of taking frogs, turtles and fish thereon is a cloud upon plaintiff's title to the great depreciation of value of said premises, and the defendants are wholly insolvent or at least unable to respond in damages to the amount that the plaintiff would be entitled to recover against them, and little, if anything, could be collected against them with an execution, and by reason of the character of said premises they have a peculiar value to the plaintiff, and the threatened injuries, if consummated, could not be compensated in damages.

Wherefore plaintiff prays that said defendants be compelled to discover and set forth particularly the exact nature and extent of their pretended claim, interest, and estate in said premises and that the same be adjudged null and void and that plaintiff's title be quieted against the same; that defendants be enjoined from setting, placing and drawing seines, fish nets, and other devices for catching fish, turtles, or other game, upon said premises, and from catching and removing fish, turtles, and other game from said waters, and that they be enjoined from hunting and capturing frogs and other game thereon and from removing same therefrom, and that they be ordered and required to remove from said premises all seine nets, and other devices, for catching fish, frogs, turtles, and other game, and upon final hearing hereof said injunction be made perpetual, and for such other and further relief in the premises as equity and good conscience may require.

E. G. LOVE,
Plaintiff's Attorney.

State of Ohio, }
Ottawa County. } ss.

Ed. Mackey, being duly sworn, says that the plaintiff is a corporation; that he is the agent, duly authorized in the premises, and that the facts set forth in the foregoing pleading are within affiant's personal knowledge, and that they are true.

ED. MACKEY.

Sworn to before me and subscribed in my presence this 13th day of January, A. D. 1894.

[SEAL.]

SCOTT STAHL,
Notary Public.

IN THE COURT OF COMMON PLEAS, OTTAWA COUNTY, OHIO.

The Winous Point Shooting Club,
Plaintiff,
v.
Jeppe Caspersen, Peter Petersen, Wm. Decker and Charles Petersen,
Defendants.

PRECIPE.

To the Clerk: Issue summons for the defendants above named, directed to the sheriff of Ottawa county, returnable according to law, and endorsed, "Injunction allowed and bond given."

E. G. LOVE,
Plaintiff's Attorney.

Temporary injunction allowed as prayed for in the petition upon plaintiff giving bond to the approval of the clerk in the sum of $100 conditioned according to law.

MALCOLM KELLY,
Judge.

January 13, 1894.

AMENDED ANSWER.

[Filed December 4, 1897.]

Now come the defendants, and for their amended answer herein, say that they admit that plaintiff is a corporation duly organized and existing under the laws of the state of Ohio.

Defendants admit that they have fished, and now claim the right to fish in the waters of Mud Creek Bay, so called, and to drive stakes into the soil under said waters, and to

fasten nets to the same for the purpose of catching fish, and to remove fish from said waters with pounds, seines and other fish nets, and that they threaten to continue with nets and devices for catching fish, and catch and remove fish from said waters of Mud Creek Bay, or Mud Bay which is a navigable bay connected with Sandusky Bay and Lake Erie, in which the waters rise and fall with the waters of Sandusky Bay and Lake Erie, and is about four miles long, east and west, and is about one mile wide, north and south, and is from four to seven feet in depth throughout, and since the settlement in that vicinity by white people, has been continuously and uninterruptedly used by the public for fishing, and without objection from any, until the plaintiff claimed the right to convert said public water into a private duck pond for the exclusive use and enjoyment of its members, and to exclude the defendants from fishing therein.

Defendants deny that they claim any estate or interest in said premises adverse to plaintiff's rights except such rights as the members of plaintiff and defendants mutually have with the public generally, viz: The right to fish in and upon the waters covering the lands described in plaintiff's petition.

Defendants deny each and every allegation in said petition contained not hereinbefore admitted.

Defendants therefore ask that plaintiff's petition be dismissed and defendants go hence and secure their costs.

GEO. A. TRUE,
Attorney for Defendants.

(Duly verified.)

REPLY.

Plaintiff for reply to defendants' answer filed herein says:

First. It denies that the defendants or either of them have any right to fish in the waters covered by the lands

described in the plaintiff's petition or the right to hunt ducks, geese, frogs turtles and other wild game, in, upon and over said premises.

Second. Plaintiff denies that the public generally or the defendants as members of the public have any of the rights above mentioned.

Third. Plaintiff denies that the Sandusky River empties into Mud Creek Bay.

Fourth. Plaintiff denies that Mud Creek Bay (so called) is the western continuation of Sandusky Bay, and denies that the same has been continuously and uninterruptedly used without objection by the public for fishing and hunting, since the settlement of the country in that vicinity by white people, and also denies that any part of the premises described in its petition are public waters.

Fifth. Plaintiff further replying says: That at the December term, 1888, of the circuit court within and for Ottawa county, state of Ohio, in an action then pending in said court, wherein this plaintiff was plaintiff and the defendant Joseph Brown and others were defendants, for the same causes of action alleged in the petition herein, and in which action the same defenses were made by the defendants therein as are now made by the answer of the defendants herein, the plaintiff, by the consideration of said court recovered a judgment on the merits thereof, as follows, to-wit: "That the waters described in plaintiff's petition, and the lands covered thereby, and extending from Bixler's Point, so called, on the west to the east end of Eagle Island, so called, on the east, and all included in, and are part and parcel of sections twenty-one (21) to twenty-eight (28) both inclusive, of township six (6), North, Range Sixteen (16) east, of the original United States government

survey and consists of Mud Creek Bay, so called, and portions of Mud Creek and Sandusky River.

That Mud Creek is a small stream of water which rises in Wood county, Ohio, and flows in a northeasterly direction, through Sandusky and Ottawa counties, a course of about thirty miles.

For a considerable part of its course, and through all that part claimed by the plaintiff, it is navigable, and flows in a direction of about due east. Bixler's Point is a point of land on the north side of the stream, and about one-half mile below it, is a long point of land on the south side of the stream known as Long Grassy Point, and at this point the stream widens out into an expanse of water, locally known as Mud Creek Bay, which is from one and one-fourth to one and one-half miles long, east to west, and in width varies from one mile near its west end, to about one-half mile at its narrowest point when it empties into the Sandusky River between Squaw Island on the south, and the Winous Point on the north.

The channel of Mud Creek continues on down through Mud Creek Bay to its mouth, with a depth of about seven feet and an intermediate width, but wide enough to admit the passage of ordinary water craft navigating these waters.

From the channel each way, the water shoals to a depth of four feet, or less near the shores, which are low and marshy.

That Sandusky River is a much larger stream than Mud Creek, after flowing through portions of the lands described in the petition, it is joined by South Creek, a small stream entering through its right bank, and from this point the river flows in a direction almost due north, between Squaw Island on its west bank, and Peach Island, Cape Island and the Middle Ground, so called, on its eastern bank, and just as it

passes the Middle Ground receives the waters of Mud Creek Bay.

At this point it turns sharply to the east and flows along the northern margin of the Middle Ground, till it reaches a point between Canvas Back Point, on the north, and the west end of Eagle Island, on the south, where it separates into two channels, one of which turns and flows northeasterly and empties into Sandusky Bay, between Slate's or Slade's Point on the north, and a point midway between Eagle Island and Eagle Island Marsh, on the south; and the other turns and flows southeasterly, from the point of separation, along the easterly margin of the Middle Ground and empties into Sandusky Bay, between a point midway between Eagle Island and Eagle Island Marsh, on the north and South Point so called, on the south; South Point being a head land on the south shore in section twenty five (25) about thirty rods east of the west line of said section.

The channel of Sandusky River from a point between Squaw Island and Peach Island, to the west end of Eagle Island, has a uniform width of about six hundred feet, and an average depth of about ten feet, and is a natural channel, at the point of junction with Mud Creek Bay, so called.

Sandusky River is considerably deeper than the channel of Mud Creek Bay. The distance from the junction to the mouth of Sandusky River is from one and one-fourth to one and one-half miles.

The waters of Sandusky River flow between and completely separate the waters of Mud Creek Bay from the Sandusky Bay. On either side of the channel of Sandusky River where it flows east along the northern margin of the Middle Ground, is an expanse of water of considerable extent and ranging in depth from three to five feet, the average depth on

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the Middle Ground at ordinary stages of water being from three to four feet, a part of this expanse of water is a channel known as "Cape Island Channel," between the Middle Ground and Cape Island on the north and Peach Island on the south, through which a portion of the waters coming down Sandusky River leave the main channel and flows eastward, and rejoin the waters of the river again at or near its southern mouth and thence empties into Sandusky Bay. This channel is only three or four feet deep and in the summer and autumn is covered over with reeds, rushes and other low land vegetation. Between Squaw Island and the adjacent land on the west is a channel which at first was an artificial channel but which has been enlarged by the action of the water to a considerable width and to a depth of four or five feet, through which some of the waters of the Sandusky River pass into Mud Creek Bay, and thence join again the main channel of the river; but the main body of the water united with South Creek near Peach Island and Squaw Island, retains its identity and flows in a clearly marked and well defined channel to its mouths in Sandusky Bay.

At and beyond the northernmost mouth is a bar formed by the deposits from the waters of the river as they mingle with the waters of Sandusky Bay. The channel has been kept open through this bar by dredging at different times. That the channel of Sandusky River and Mud Creek Bay are always clear of vegetation, and in the summer months and early autumn their limits are clearly and sharply defined by the rushes, reeds and other lowland and marsh vegetation, which grows more or less over all the other portions of these waters. Mud Creek Bay and Sandusky River both rise and fall with Sandusky Bay, but receive their waters generally from above and continually flow out through their channels

toward Sandusky Bay, and finally empty into Sandusky Bay through the two mouths of Sandusky River.

That the plaintiff is a corporation, created and existing under the laws of Ohio, and has the legal title in fee simple to, and is in possession of, all the following described real estate, which includes all the said lands and waters covered thereby, and all the shores thereof, and other adjacent lands, the whole being more particularly described as follows, to wit:

Situated in Ottawa and Sandusky counties, in the state of Ohio, and being all the lands covered by the waters and all the waters of Mud Creek, Mud Creek Bay and the mouths of Sandusky River, with all their arms, inlets and indentations and all the islands therein from Bixler's Point on the west, to Slate's or Slade's Point and the east end of Eagle Island, on the east, subject only to the public easement of navigation; and all the shores and marsh lands in Bay township, Ottawa county, bordering thereon, including sections 24–23, the south half of the north half of 22, and the southeast quarter of the northeast quarter of 21.

Also including all the shores and marsh land in Sandusky county, bordering upon said waters between said eastern and western limits, on the south, and extending down to Sandusky Bay, and included within sections 25, 26, 27, 28, 34 and 35, in Sandusky county, all said sections being in township 6, north, range 16, east.

It is therefore considered by the court, that the claims of the defendants, and each of them, of a right to drive, keep and maintain stakes in the soil covered by said waters, and of a right to place, keep and maintain pounds, seines and fish-nets, and other appliances for the catching of fish in said waters and of a right to catch fish therein, and take them therefrom be and the same is adjudged and decreed to be

wholly and in all respects null and void, as against the plaintiff; and that the plaintiff's title and possession be, and they hereby are quieted against all said claims, and all claims asserted by the defendants in this action; and it is ordered and adjudged, that said defendants, and each of them, be, and they hereby are perpetually enjoined from driving, keeping or maintaining stakes in the soil in said waters; and from setting, keeping or maintaining pounds in said waters, and from drawing seines through, and from in any manner catching fish in said waters; and said defendants are hereby ordered and enjoined, without delay, to remove from said waters, and from said premises, all stakes, pounds, seines, fish-nets, and all appliances for catching fish, and in default thereof, the sheriff of Ottawa county, is ordered to remove the same, which said judgment is in full force unreversed.

BARTLETT & WILSON,
S. R. HARRIS,
and E. G. LOVE,
Plaintiff's Attorney.

(Duly certified.)

MOTION FOR NEW TRIAL.

[Filed March 9, 1900.]

Now comes the plaintiff and moves the court for a new trial of this cause for the following reasons, to-wit:

1. Because the findings of fact are contrary to the evidence.

2. Because the findings of fact are against the weight of the evidence.

3. Because the findings of fact are not supported by sufficient evidence.

4. Because the findings of fact are insufficient and incomplete upon the evidence adduced to the court.

5. Because the decision, decree and judgment of the court is not supported by sufficient evidence and is against the weight of the evidence.

6. Because the decision, decree and judgment of the court is contrary to law.

7. Because the decision, judgment and decree of the court should have been for the plaintiff and against the defendants.

S. H. HOLDING,
J. R. BARTLETT,
and E. G. LOVE,
Plaintiff's Attorneys.

TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES TO CIRCUIT COURT.

The State of Ohio, } ss.
Ottawa County. }

IN THE COURT OF COMMON PLEAS.

The Winous Point Shooting Club,
Plaintiff,
v.
Jeppe Caspersen et al.,
Defendants.

I, H. B. Bredbeck, clerk of the court of common pleas within and for the county of Ottawa, do hereby certify that the following entries and judgments are truly copied from the dockets and journals of said court, to wit:

The Winous Point Shooting Club,
Plaintiff,
v.
Jeppe Caspersen et al.,
Defendants.
No. 4027.

May 28, 1894. Journal 10, 416.

This cause is continued, and on application of the plaintiff it has leave to reply herein within rule after term.

The Winous Point Shooting Club,
Plaintiff,
v.
Jeppe Caspersen et al.,
Defendants.
No. 4027.

November 12, 1894. Journal 10, 548.

On application of the plaintiff, it has leave to reply herein by November 17, 1894.

IN THE COURT OF COMMON PLEAS OF OTTAWA COUNTY, OHIO.

The Winous Point Shooting Club,
Plaintiff,
v.
Jeppe Caspersen et al.,
Defendants.
No. 4028.

January 6, 1896. Journal 11, 285.

It is hereby stipulated that this cause may be marked "off docket" pending the determination of the case of The Winous Point Shooting Club v. Henry Bodi, et al., in the Supreme Court of Ohio.

E. G. Love,
Attorney for Plaintiff.
Geo. A. True,
Attorney for Defendant.

IN THE COURT OF COMMON PLEAS OF OTTAWA COUNTY, OHIO.

The Winous Point Shooting Club,
v.
Jeppe Caspersen et al.

Journal Entry. November 22, 1897. Journal 12, page 160.

Defendants have leave to withdraw answer and file amended answer in fifteen days.

1400

IN THE COURT OF COMMON PLEAS OF OTTAWA COUNTY, OHIO.

The Winous Point Shooting Club,
Plaintiff,
v.
Jeppe Caspersen, Peter Petersen, William Decker and Charles Petersen,
Defendants.

Journal Entry. Journal 12, 556. March 14, 1899.

This day this cause came on to be heard upon the pleadings, the evidence and arguments of counsel, and the court being fully advised in the premises, finds the issues herein in favor of the defendants, and each and all of them, and finds that the injunction herein should be and hereby is dissolved and the petition dismissed, and the plaintiff pay all the costs in this action and in default thereof that execution be issued therefor.

The court further finds that the navigable waters in dispute in this case, form part of a public bay and not parts of the Sandusky River and Mud Creek; and being part of an open bay the defendants have the rights of navigation and fishing in said waters.

And thereupon the plaintiff gave notice of its intention to appeal this cause to the circuit court of Ottawa county, Ohio, and the court fixed the bond for such appeal at $110.00, with sureties to the approval of the clerk.

This 7th day of April A. D. 1899, an appeal bond was filed in this case with approved sureties.

[SEAL.] H. B. BREDBECK,
Clerk of Courts.

State of Ohio, } ss.
Ottawa County. }

I, H. B. Bredbeck, clerk of the court of common pleas in and for said county, do hereby certify that the foregoing is a true transcript of the docket and journal entries of said court in the above entitled cause, and that the said The Winous Point Shooting Club entered into a written undertaking with approved sureties, conditioned to abide and perform the order and judgment of the circuit court, and to pay all moneys, costs and damages which may be required of or awarded against said ———— by said circuit court; and I further certify that the papers herewith sent, numbered from one up to twelve, are the original papers and pleadings filed in the above cause of The Winous Point Shooting Club, plaintiff, against Jeppe Casperson et al., defendants.

In testimony whereof, I hereunto set my hand and affix seal of said court of common pleas on this 7th day of April, A. D., 1899.

H. B. Bredbeck, Clerk.

TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES TO SUPREME COURT.

The State of Ohio, } ss.
Ottawa County. }

IN THE CIRCUIT COURT AND COMMON PLEAS COURT.

The Winous Point Shooting Club,
Plaintiff,
v.
Jeppe Caspersen et al.,
Defendants.

I, H. B. Bredbeck, clerk of the circuit and common pleas courts within and for the county of Ottawa, do hereby certify that the following entries and judgments are truly copied from the dockets and journals of said courts to-wit:

The Winous Point Shooting Club,
Plaintiff,
v.
Jeppe Caspersen et al.,
Defendants.
No. 4027.

May 28, 1894.

Journal 10, 426.

This cause is continued, and on application of the plaintiff it has leave to reply herein within rule after term.

The Winous Point Shooting Club,
Plaintiff,
v.
Jeppe Caspersen et al.,
Defendants.
No. 4027.

November 12, 1894.

Journal 10, 548.

On application of the plaintiff, it has leave to reply herein by November 17, 1894.

IN THE COURT OF COMMON PLEAS OF OTTAWA COUNTY, OHIO.

The Winous Point Shooting Club,
Plaintiff,
v.
Jeppe Caspersen et al.,
Defendants.
No. 4028.

January 6, 1896.

Journal 11, 285.

It is hereby stipulated that this cause may be marked "off docket" pending the determination of the case of the Winous Point Shooting Club v. Henry Bodi et al., in the Supreme Court of Ohio.

E. G. Love,
Attorney for Plaintiff.
Geo. A. True,
Attorney for Defendants.

IN THE COURT OF COMMON PLEAS OF OTTAWA COUNTY.

The Winous Point Shooting Club
v.
Jeppe Caspersen et al.

JOURNAL ENTRY.

November 22, 1897.

Journal 12, page 160.

Defendants have leave to withdraw answer and file amended answer in fifteen days.

IN THE COURT OF COMMON PLEAS OF OTTAWA COUNTY, OHIO.

The Winous Point Shooting Club,
Plaintiff,
v.
Jeppe Caspersen, Peter Petersen, Wm. Decker and Charles Petersen,
Defendants.

JOURNAL ENTRY.

Journal 12, 556.

March 14, 1899.

This day this cause came on to be heard upon the pleadings, the evidence and arguments of counsel, and the court being fully advised in the premises, finds the issues herein in favor of the defendants and each and all of them, and finds that the injunction herein should be and hereby is dissolved and the petition dismissed, and the plaintiff pay all the costs

in this action and in default thereof that execution be issued therefor.

The court further find that the navigable waters in dispute in this case, form part of a public bay and not parts of the Sandusky River and Mud Creek; and being part of an open bay the defendants have the rights of navigation and fishing in said waters.

And thereupon the plaintiff gave notice of its intention to appeal this cause to the circuit court of Ottawa county, Ohio, and the court fixed the bond for such appeal at $110.00 with sureties to the approval of the clerk.

This 7th day of April A. D. 1899, an appeal bond was filed in this case with approved sureties.

[SEAL.] H. B. BREDBECK,
Clerk of Courts.

O. K., LOVE & G. A. T.

IN THE COURT OF COMMON PLEAS OF OTTAWA COUNTY, OHIO.

Docket Entries from Appearance Docket No. 12, Page 4028.

The Winous Point Shooting Club,
Plaintiff,
v.
Jeppe Caspersen, Peter Petersen, William Decker and Charles Petersen,
Defendants.

EQUITABLE RELIEF.

1894, January 15. Petition and precipe filed and summons issued.

1894, January 15. Injunction allowed and endorsed on petition.

1894, January 15. Bond filed.

1894, January 22. Summons returned "Endorsed." Received this writ January 15, A. D. 1894, at 4 o'clock P. M., and served same by delivering to the within named defendants, Jeppe Caspersen, Peter Petersen and Charles Petersen, each a true and certified copy thereof with all the endorsements thereon personally January 16, 1894, and on the same day served the same by leaving a true and certified copy thereof and all the endorsements thereon at the usual place of residence of the within named William Decker.

FRED BOLTE, Sheriff.
By JOHN H. GOODE, Deputy.

1894, March 30. Answer filed.

1894, March Term. Journal 10, page 415, continued.

1894, May 28. Journal 10, page 426, continued, leave to reply, etc.

1894, November 12. Journal 10, page 548, leave to reply by 17th.

1894, November 17. Reply filed.

1894, January Term. Journal 11, page 54, continued.

1895, April Term. Journal 11, page 200, continued.

1895, September Term. Journal 11, page 221, continued.

1896, January 6. Journal 11, page 285, off docket.

1897, August 16. Received of plaintiff costs to date $10.34.

H. B. BREDBECK, Clerk.

1897, November 22. Journal 12, page 160, leave to file amended answer.

1897, December 4. Amended answer filed.

1898, January Term. Journal 12, page 268, continued.

1898, May Term. Journal 12, page 246, continued.

1898, November Term. Journal 12, page 424, continued.

1899, March 14, Journal 12, page 556, decree for defendant, see entry.

1899, April 7. Appeal bond filed.

1899, April 7. Transferred to circuit court under No. 174, Complete Record 4, page 55.

IN THE CIRCUIT COURT OF OTTAWA COUNTY, OHIO.

The Winous Point Shooting Club, Plaintiff,
v.
Jeppe Caspersen et al., Defendants. } No. ---.

JOURNAL ENTRY.

Journal 2, page 225.

Filed April 14, 1900.

Now, April 14, 1900, comes the plaintiff and presents its bill of exceptions, which is allowed, signed and sealed by a majority of the judges composing the trial court, and is made a part of the record in this case but it is not to be recorded or spread upon the journal.

IN THE CIRCUIT COURT OF OTTAWA COUNTY, OHIO.

The Winous Point Shooting Club,
Plaintiff,
v.
Jeppe Caspersen et al.,
Defendants.

JOURNAL ENTRY.

Journal 2, page 119.

December Term, 1899, to-wit: March 9, 1900.

This cause came on to be heard in this court on appeal from the court of common pleas of Ottawa county, and the court finding that the appeal has been perfected in all respects as required by law, came on to be heard upon the pleadings, evidence and arguments of counsel, and was duly submitted to the court, and the court being fully advised in the premises, upon request of all parties that its findings of fact and conclusions of law be stated separately, makes the following as its findings of fact:

First. Plaintiff is a corporation duly created and existing under the laws of Ohio, for the purpose, among other things, of hunting, fishing, the protection of fish and game and lawful sporting, and, in furtherance of said purposes has purchased, acquired and improved at large outlay, and has a legal title in fee simple to, and at the commencement of this action and for many years prior thereto it was and still is in the actual possession of so much of the lands, marshes and shores described in the petition (except section thirty-five), as described and comprised in the sections and fractional sec-

tions described in the survey and map made by Sylvanus Bourne, mentioned in the next paragraph hereof, as plaintiff therein alleges it is the owner. That under and by virtue of authority of an act of Congress passed March 18, 1796, providing for the sale of lands of the United States, in the territory northwest of the Ohio River, and of an act supplemental thereto, a survey was made by Sylvanus Bourne, government engineer, in 1820, of the lands and marshes described in said fractional sections, but meandered the shore line of said waters, and divided the said marshes and lands into townships and sections in conformance with the directions prescribed in said act. Said surveyor noted in his field book the situation of all water courses within said territory, and also the quantity of the lands, and, in further compliance with said act, a plat was made of all of said lands and water courses and waters, and a copy of said plat is on file in the offices of the county surveyors of Sandusky and Ottawa counties, Ohio, copies of which were introduced in evidence, and, with the field notes accompanying the same, are attached to the bill of exceptions herein and by reference are made part of this finding of facts. It is found that said surveyor in 1820 meandered Sandusky Bay and the other waters within the lines of said sections and fractional sections, along the shores and banks of the same, and gave courses and distances and certain monuments, all of which are shown by the field notes attached to said plat, and described said waters in his field notes as "Muddy Creek" and "Sandusky River." From said plat and field notes it appears that said surveyor determined the number of acres of land in the fractional sections bordering upon said waters, and did not include the lands under the waters in his computation and statement of the lands in said sections and fractional sections

described in such survey and plat. That much of said property so surveyed in said fractional sections aforesaid is now submerged and overflowed land, and much was marsh land at the time of said survey and was acquired from the state of Ohio directly or indirectly through plaintiff's grantors and predecessors in title under what is known as the swamp land acts. The other lands, *i. e.*, those not granted by the State as swamp lands, were patented by the Government to plaintiff's predecessors in title.

Second. That said sections mentioned in the petition as 21, 22, 23, 24 and 25, are situated in Ottawa county, and sections 13, 14, 15, 16 and 20 shown upon said plat and upon the surveys of said territory which were offered in evidence are also situated in Ottawa county; and the other sections mentioned in the petition, to-wit, sections 25, 26, 27, 28, 34 and 35 are in Sandusky county. Said sections all lie adjoining and comprise an area of twelve square miles, being four miles east and west, and three miles north and south. That said sections situated in Ottawa county are numbered west and east consecutively, beginning with section 21, and beginning with section 25 the numbers run consecutively to the west, ending with section 28, and beginning with section 33, south of section 28, the numbers run consecutively to the east, ending with section 26, section 25 is south of section 24, and a large portion of said twelve square miles is covered with water.

Third. The points of land and marsh, the water indentations into the land and marsh, the marshes, shoals, islands, bodies of water and other features within this area of twelve square miles, have local names, and are located and described as follows:

"Horse Shoe Island," which is situated in the southeast quarter of section 20, lying west of section 21, and is sur-

rounded by water. The territory now known as "Horse Shoe Island" was not shown or designated on the plat and survey of Sylvanus Bourne made in 1820, as an island.

"Bixler's Point" is the southwestern point of a strip of land and marsh running from the southwest quarter of section 21 northeast to the northwest quarter of section 22, and is *surrounded by water when the water is at a high stage, but* when the water is at ordinary stage it is separated from the main land by a narrow channel or ditch only, partly artificial, which row-boats or other small boats may pass through.

"Winous Point" is the southeastern point of an irregular body of land and marsh lying in the south half of section 22 and is surrounded by water, when the water is at a high stage. The club house and boat house of plaintiff are built upon Winous Point. When the water is at ordinary stage it is separated from the main land about the same as "Bixler's Point," but not at all when the water is low. Both Bixler's Point and Winous Point are shown in said map of Sylvanus Bourne as part of the main land, but are not named thereon.

"Canvas Back Point" is a point of land and marsh extending south from the mainland in the northeast quarter of section 23 into the southeast quarter of said sections.

"Slate's Point" or "Slades Point" is a small point of land extending from the main land in the southwest quarter of section 13, and is a little west of north of "Eagle Island."

"Eagle Island" is situated in section 24, and is entirely surrounded by water, and, as surveyed by the United States government in 1820, contained about 135 acres, but the island has been washed away and now contains about three acres, and is situated near the center of the south half of said section 24. The part of said 135 acres submerged is traceable by aquatic vegetation.

"Nigger Head" is an island or bog situated on the section line between sections 23 and 24, west of Eagle Island, and is smaller than Eagle Island. It was originally a part of Eagle Island.

"Peach Island" is situated in the north half of section 26, and the east part thereof is separated from a similar body of land and marsh lying to the east and south by a stream called Tommy Creek. This body of land and marsh lying to the east and south of Tommy Creek is much larger than Peach Island and is situated in the east part of section 26, the southwest part of section 25, the northwest part of section 36, and the northeast part of section 35, and the southeast part thereof is separated from the main land at the southeast by a stream called Raccoon Creek, and the northeast point of said body of land and marsh is called South Point.

"South Point" is in the northwest quarter of section 25, and about southwest from Eagle Island.

"Cape Island" is a small point of marsh land situated in the northwest quarter of section 26, and is partly submerged.

The "Middle Ground" is that portion of the submerged and overflowed lands lying south and east of the Sandusky River, from the point where it turns north between Squaw and Peach Islands, and runs in a northerly and thence in an easterly direction. At one time it was marsh land, and was so surveyed by the government in 1820, as shown by said Bourne map. By the action of the waters this marsh land has been submerged and overflowed, and in low water parts of it are sometimes bare. The water thereon at its ordinary stage is from one to three feet deep, and in seasons of vegetatation, from the latter part of May or first of June to late in October, it is covered nearly all over with a mass of vegetation composed of eel grass, wild celery, arrow head, lily pads,

reeds and flag grass, etc., so dense and thick in many places that it is impossible for boats to sail or navigate thereover, and only flat-bottomed boats drawing a few inches and propelled by the laborious method of punting can get through the said vegetation.

"Squaw Island" is situated in the northeast quarter of section 27, and is smaller than Eagle Island, and was originally connected with a part of the marsh land southwest of the same, but is now separated from said marsh lands by a wide channel, originally a narrow artificial channel.

"Mud Creek Bay" is that body of water lying west of a line drawn from Winous Point to Squaw Island. "Mud Creek Bay" as a local name given to a portion of the waters of Mud Creek which have spread over and, together with waters coming from the north and south marshes, have submerged and overflowed the lowlands contiguous to its channel. It was not mentioned in the government survey of 1820, made by Bourne, but is there designated as Muddy Creek. At that time the lands contiguous to Muddy Creek were generally marsh lands, part of which have been submerged since by the action of the water, and the waters over these lands then and since submerged make what is locally called "Mud Creek Bay." The water in it varies at its ordinary stage from six inches to four or five feet in its deepest place, except in the channel of Mud Creek, which flows through it, which varies in depth from five to seven feet. During the season of vegetation, from the first of June to the latter part of October, a large part of it is covered with aquatic vegetation, some of which grows three or four feet above the water, and some of which lies upon the surface of the water. This aquatic vegetation is composed of reeds, flag grass, bulrushes, deer tongue, arrow head, lily pads, eel grass and wild celery. A

large part of it cannot be used by boats at any season except by those which draw less than two to three feet, and is only used by fishing skiffs, pound boats and gunning canoes. During the season of vegetation, in many places it is impossible to get a canoe, row boat or other kind of boat over many parts of it, except by the laborious method of punting.

"Eagle Island Marsh" is a small marshy bog upon which rushes grow above water, and lies east of Eagle Island in Sandusky Bay.

"Middle Island" is in the southeast quarter of section 21, and consists of about one-half acre of marsh and is covered by water (except when the water is at very low stage, when the land is exposed), but is marked by the aquatic vegetation which grows upon it.

"Long Point" is in the southeast quarter of section 21. It runs out from the mainland and consists of rushes and other aquatic vegetation, and is submerged at times, except when the water is at a low stage.

"Blood Point" is a small point of marsh land in the northeast quarter of section 28, projecting into Mud Creek Bay.

"Tommy Creek" is a small creek emptying into the Sandusky Bay, in section 26, having a width of about twenty feet and an ordinary depth of about three feet.

"South Creek" runs in a northeasterly direction through sections 34, 27 and 26, and empties into the Sandusky River channel between Squaw Island and Peach Island. It has an average depth of from two to four feet, and has been used by scows in hauling wood from the country to the south. There are some small islands in said South Creek.

"Green Creek" is a small creek emptying into the Sandusky River in the southeast quarter of section 28, and the ordinary depth of water therein is from one foot to four feet.

Fourth. Commencing at Slate's or Slade's Point, the present shore runs southwesterly to Canvas Back Point: thence by irregular courses on lines approximating those shown on the Bourne map, except as herein otherwise specifically shown, but including, as a part of the mainland, all that body of land and marsh extending south to and including Winous Point, and all that body of land and marsh extending south to and including Bixler's Point, and all that body of land and marsh extending north to and including Peach Island.

This shore line is well defined over part of its extent, and at other points consists of dry land, marsh land and submerged land, merging into one another and in such irregular and diversified forms, varying with the seasons of the year and varying stages of the water and changes in vegetation, so that what appears at one time as shore line appears at another time to be far inland, and at another time as a part of Mud Creek, and so that the court cannot, from the evidence, lay down accurate lines to designate said shore line; but back of this varying shore line for a considerable distance is marsh land subject to overflow in high water caused by the rise of the waters in Lake Erie and Sandusky Bay. The marsh lands lying back of said shore line of said Mud Creek Bay and Sandusky Bay have appellations for different portions of the same as follows:

"Goose Island," "Nigger Foot," and "Mutton Chop" are small marshy bogs in section 23.

"Camel Back" and "Sea Horse Island" are marshy bogs in sections 22 and 23.

"Sempler's Island," "Dalzell Island" and "Durbin's Island" are marshy bogs in section 22.

"Sausage Island," "Boot Island," "Gibralter" and "Malta" are small marshy bogs in section 21.

"Cat Tail," "Cave Island," Hickory Island," "Clarke Island," Nugget Island," "Tear Drop" and "Jaw Bone" are marshy bogs in section 24.

"Bartlett Island" is in sections 34 and 35.

"Fox Island" is a marsh lying south of the Sandusky River in sections 27, 28, 33 and 34.

Fifth: "Mud Turtle Hole" is a pond in section 23, lying between Mutton Chop Island and the main land, and the ordinary depth of water in it varies from six inches to three feet.

"Great Goose Pond" and "Chapin's Bayou" are in section 23 and the ordinary depth of water therein is about one foot.

"Little Goose Pond" is in section 23, and the ordinary depth of water is about one foot.

"Big Channel" is in section 23 between Camel Back and other marsh land lying east of it, and the water at ordinary stage is from two to three feet.

"Goose Channel" is in section 23 between Goose Island and Harris Point, and the ordinary depth of water is about two feet.

"Earl's Pond" is mostly in section 22, and lies to the north of Sempler's Island, Dalzell Island and Camel Back, and the ordinary depth of water therein is about two foot.

"Sadler's Pond" is in sections 22 and 15, and has an ordinary depth of about one foot.

"Lucy's Pond" is in section 15, and has an ordinary depth of about one foot.

"Bay Tree Pond" is in section 15, and has an ordinary depth of about one foot.

"Durbin's Pond" is in the northwest quarter of section 22, and has an ordinary depth from two to three feet.

"Lily Pond" is in the northeast quarter of section 21, and has an ordinary depth of about one foot.

"Muskrat Pond" is in the northeast quarter of section 21, and has an ordinary depth of about one foot.

"Lily Pond Channel" is in the northeast quarter of section 21, and the water therein is about one foot deep.

"Stager's Bayou" and "Nolan's Bayou" are in the northwest quarter of section 21, and the water therein is about one foot deep.

"Bunker Hill Pond" is in the northwest quarter of section 21, and the water therein is from two to three feet deep.

"Horse Shoe Pond" is in section 20 and 21, and the ordinary depth of water therein is from two and a half to three feet.

"Green Wing Bay" is in the northwest quarter of section 21, and the ordinary stage of water therein is about one foot.

"Gardiner's Bayou" is in the northwest quarter of the southeast quarter of section 20, and the water therein is about one foot deep.

"Pin Tail Bay" is in the southeast quarter of section 21, and has an ordinary depth of about two feet.

"Brown's Pond" is in section 21, and has an ordinary depth of about one foot.

"Leonard's Pond" is in section 21 and 22, and has an ordinary depth of about two to three feet.

"Mallard Bay" is in section 23, and has an ordinary depth of about two and a half to three feet.

"Standard's Pond" is in section 22, and the water therein is about two feet deep.

"Little Mud Hole," "Big Mud Hole" and "South Mud Hole" are between sections 27 and 28, and have an ordinary depth of about one foot. Said Mud Holes connect Mud Creek

Bay with the Sandusky River between sections 27 and 28 in Sandusky county.

"Bartlett Island Bayou" is in section 27, and is about two feet deep.

"Fox Island Bayou" is partly in section 34, and has an ordinary depth of about one foot.

"Teal Pond" is in the southeast quarter of section 27, south of Sandusky River, and has an ordinary depth of about one foot.

"Peach Island Pond" is in the southwest quarter of section 26, and has an ordinary depth of about one foot.

"Fayette Bayou" and "Graveyard Channel" are in the southeast quarter of section 26, and have an ordinary depth of water of about one foot.

"Island Pond" is in the southwest quarter of the southeast quarter of section 26, and has an ordinary depth of about one foot.

"Big Bayou" and South Creek Bayou" are in section 34, and have an ordinary depth of water from one foot to three feet.

All the above named ponds, channels, and bayous are wholly inclosed by marsh lands, lie back of the shore line of Mud Creek Bay, and some of said waters have been so named by the plaintiff club. Defendants have never claimed any rights in any of said channels, ponds, or bayous, and were not fishing or hunting in, upon or over any of said marshes, ponds, channels, or bayous, at the commencement of this action, and were not claiming any right to do so. Boats cannot be navigated from the open waters of Sandusky Bay to or into any of said waters.

Sixth. "Raccoon Creek" flows in a northerly direction through section 35 into section 26, where it turns in an

easterly direction and runs through the southeast quarter of section 26 into the southwest quarter of section 25, in which it empties into Sandusky Bay.

At its mouth it has a width of about forty or fifty feet, and spreads out somewhat where it gets into the marsh in section 35. The average depth of water at the mouth of the creek is six or seven feet, and becomes shallow as it passes through the marsh. It is navigable from the bay to its first turn south, ascending the stream, and no farther, except for small row boats and the like.

"Tommy Creek" is a small creek emptying into the Sandusky Bay in section 26, and has a width of about twenty feet and a depth of water of from one to three feet. It is not navigable except for small row boats and the like.

"South Creek" rises some miles back in Sandusky county, flows northeasterly through sections 34, 27 and 26, and joins the Sandusky River between Peach Island and Squaw Island, and has a depth of water from three to four feet in places, but is very shallow in other places, and cannot be entered at its mouth except by small row boats and the like. There are some small islands in South Creek.

"Green Creek" is a small creek emptying into the Sandusky River in the southeast quarter of section 28, and the ordinary depth of water therein is from one to three feet, and is not navigable except by small row boats and the like.

Seventh. "Muddy Creek" or "Mud Creek" is a small stream which rises many miles west and flows in a northeasterly direction, and for several miles up stream from its mouth it is navigable for ordinary sized water craft drawing from three to four feet of water. When said Mud Creek reaches the northeast quarter of section 29, west of section 28, it opens out into a wider expanse of water called Mud Creek

Bay, which is about one and one-fourth miles long east to west, and in width varies from about one mile to about one-half a mile, except at Bixler's Point, where it is much narrower. The course of Mud Creek is defined by banks until it reaches the northeast quarter of said section 29, where it enters the wide water aforesaid, and from there downward in its course there are no banks except the shore line of the so-called Mud Creek Bay, but there is a channel to this Mud Creek leading easterly through the so-called Mud Creek Bay which is deeper than the water on either side, and which is wide enough for the passage of ordinary water craft drawing from three to five feet, out to a point a little east of a line from Squaw Island to Winous Point, where it empties into another channel hereinafter mentioned. The channel of Mud Creek through Mud Creek Bay has a depth of from five to seven feet, and from each way the water along most of the shore shoals to a depth of a foot or less near the shores which are low and marshy, but in some places the water is from three to four feet deep near the shore. Boats drawing not to exceed three to five feet, at a good stage of water, can pass over the waters of this Mud Creek Bay outside of this channel, for varying distances therefrom, and in the spring season of each year there is nothing to indicate this channel in Mud Creek Bay, but from June until about the first of October eel grass and other aquatic vegetation comes up to the surface of the water and marks distinctly the channel and current caused by the flow of the water of Mud Creek downward through this wide expanse of water to the point above referred to, until such vegetation is cut down by frost and carried away by ice.

Eighth. "Sandusky River" is a much larger stream than Mud Creek, and is navigable in its channel as far up as Fremont, a distance of about twenty miles. It has an average

depth of twelve feet in its main channel, and is navigated by vessels engaged in commerce which draw less water. This channel is a natural one and the government on a number of occasions has dredged it near the east end of Eagle Island, where a bar forms. Between Squaw Island and Eagle Island the government has marked the course of the channel with buoys for purposes of navigation. About where the river enters the southwest quarter of section 28 its banks become low and marshy, and, when it reaches a point at or near Squaw Island in section 27, the waters of the river spread out into a wider expanse of water and the channel banks do not appear above the water from that point to Sandusky Bay, except when the water is very low, at which time, the channel banks are in part exposed. The expanse of water on either side of the channel of the river below Squaw Island and below its junction with Mud Creek has a depth in its deepest place of about four and a half to six feet near the channel bank and shoals uniformly from those places to the shores, except in what is known as the Middle Ground, in which the water is of much less depth. When these waters were meandered by Sylvanus Bourne, in 1820, as aforesaid, part of that portion of the territory which is now covered with water on either side of the river channel was marsh land.

During the season of vegetation, from the latter part of May or first of June until late in October, the channel is marked all the way from the place where the channel banks become low, as aforesaid, to the east end of Eagle Island, by the growth of aquatic vegetation, which grows upon the channel banks and in the shoal water between them and the dry shores. No aquatic vegetation grows in the channel of the river. The channel may be traced at all seasons of the year by the current. The channel bank is, for the greater part of

the way east of its junction with the current from Mud Creek, distinct and abrupt. These shoals, outside of the channel, in seasons of vegetation are in part covered with dense masses of aquatic vegetation so thick in many places that only small, flat-bottomed boats, drawing a few inches of water, can be floated thereover when propelled by the laborious method of punting. Other small boats in many places cannot navigate the waters of these shoals because of the density of this vegetation.

Commencing at the point where the channel banks of the Sandusky River become submerged as aforesaid, the channel and current of the river run in a northerly direction between Squaw Island on the west, and Peach Island, and the Middle Ground on the east, and just as it passes the Middle Ground the aforesaid channel of Mud Creek is connected with the channel of the river. At this point the river turns sharply to the east and runs along the northern margin of the Middle Ground until it reaches a point between Canvas Back Point on the north and the west end of Eagle Island on the south, where the channel separates into two channels, one of which turns and flows northeasterly and empties into the Sandusky Bay between Slade's or Slate's Point on the north and the east end of Eagle Island on the south. The other channel turns and runs southeasterly from point of separation along the easterly margin of the Middle Ground and empties into Sandusky Bay between the east or near the east end of Eagle Island on the north and South Point on the south. The north channel is what is known as the main channel. It is in this channel that the government has placed its buoys and at the mouth of which it has done its dredging. The south channel has a depth of five or six feet and can be navigated by water craft drawing less than that depth of water. The chan-

nel of the river from the point where it is joined by Mud Creek has a width of about six hundred feet.

Ninth. The expanse of water on either side of the channel of the Sandusky River, below Squaw Island, and also the expanse of water on either side of the channel from said junction west through Mud Creek Bay, has a depth varying from one foot to six feet and shoals to the shores. A part of this expanse of water is a channel known as "Cape Island Channel," between the middle Ground and Cape Island on the north and Peach Island on the south, through which, when the water is at a high stage, a portion of the waters coming down the Sandusky River leave the main channel and flow eastward, and rejoin the waters of the channel again at or near its southern mouth and thence empties into Sandusky Bay. This channel is only three or four feet deep at an ordinary stage of the water, and in summer and autumn is covered with reeds, rushes and other low land vegetation, so that small boats cannot move through it except by poling or punting.

Between Squaw Island and the adjacent land on the west is a channel which at first was an artificial channel, as before mentioned, but which has been enlarged by the action of the water to a considerable width and to a depth of four or five feet, through which some of the waters of the Sandusky River pass into Mud Creek Bay, and thence join again the main channel of the river, but the main body of the water united with South Creek near Peach Island and Squaw Island, retains its current and flow and follows the channel to its mouth in the Sandusky Bay.

Tenth. At and beyond the northeastmost mouth of said Sandusky River channel is a bar, formed by the deposits from the waters of the river as they mingle with the waters of Sandusky Bay. The channel has been kept open through this

bar by dredging at different times. The channels of said Mud Creek and Sandusky River are always clear of vegetation and in summer months and early autumn their limits are defined by the rushes, reeds and other aquatic vegetation, which grow more or less over all the other portions of these waters.

But in the spring of the year all that territory from Squaw Island on the south and Horseshoe Island on the west, eastward out to Lake Erie, except the island, points of land and Middle Ground herein described, is open water, except as affected outside said channels more or less by aquatic vegetation.

Eleventh. Mud Creek Bay, Sandusky River for several miles up its channel, and all the waters in question in this case, including the waters in section 20 lying west of section 21, rise and fall with the waters of Sandusky Bay and Lake Erie; the heavy southwest winds will cause said waters to fall from two to three feet below the ordinary stage, and heavy northeast winds will cause the waters of Lake Erie and Sandusky Bay to back up and thereby raise these waters from two to three feet, and when the water is the highest it sets back from the shores considerable distances, and over the islands and marsh points, so that a greater part of them can be passed over with row boats, and when the water is the lowest some of these marsh islands and points are dry. When the winds blow from the northeast, the waters are set back in a full volume from the bay the entire width. When there are no disturbing causes the waters flow in the channel sufficiently to carry off the waters coming down the river.

Twelfth. The shallower parts of the waters above mentioned are the spawning grounds for many kinds of fish, such as bass, grass pike, perch, sunfish, bullheads, pickerel, carp, and catfish, which run up the channel of the river and go up

in the shoal places and into the aforesaid creeks to spawn. Much of the aforesaid lands are marsh lands. Some of them are covered with water. A part of the submerged lands were at one time marsh lands, and were sold and conveyed by the state under the swamp land act as overflowed and submerged lands to the plaintiff or its predecessors in title. They are adapted for hunting, fishing and the harboring and protection of fish and game, and during the spring and autumn of each year are the resort of large quantities of wild ducks and other wild fowl. The waters contain large quantities of fish, fit for food and adapted to the sport of angling, and contain large quantities of turt es and frogs fit for food, and said lands derive their chief value from their adaptation to the sports of hunting and fishing and to the harboring and protection of fish, frogs, turtles, ducks and other wild fowl and game, and from their being the breeding grounds and places for ducks, frogs, turtles and other wild game and fish.

And at its conclusions of law upon the facts found, the court find:

First. That the defendants claim no public or private right of hunting upon or over any of of the lands, marshes or waters described in the petition, and the right of hunting is not an issue between the parties or involved in the issues made by the pleadings.

Second. That all those waters lying west of a line drawn from Slade's Point, or Slate's Point, to a point at the east end of Eagle Island and thence to South Point, and between Squaw Island on the south, Horse Shoe Island on the west and the shore line on the north, and lying between the shores aforesaid, form part of a public bay, and are not parts of the Sandusky River and Mud Creek; and being parts of an open bay, and navigable in part as aforesaid, the defendants as mem-

bers of the public have the right of navigation and fishing in said waters. But the defendants and the public have no right in or upon any of said lands not covered by water to an extent that marketable fish may be found therein.

Third. That plaintiff has no adequate remedy at law for the grievances threatened by the defendants as alleged in the petition.

Fourth. The court finds the issues in this case in favor of the defendants and against the plaintiff.

It is therefore considered, adjudged and decreed that the temporary restraining order heretofore allowed herein, be and the same is hereby dissolved, and that said petition be and the same is hereby dismissed.

It is further considered and ordered that the plaintiff pay the costs of these proceedings, taxed at $223.65, and that a special mandate be sent to the court of common pleas to carry this judgment into execution. To all of which conclusions of facts and law and the judgment herein the plaintiff excepts, and on this same day, to-wit, March 9, 1900, the plaintiff filed its motion for a new trial, and upon consideration the same is overruled, to which the plaintiff excepts.

Plaintiff is allowed fifty days within which to file bill of exceptions.

Indorsement on back of journal entry is as follows:

Approved. Clerk will journalize.

GEO. R. HAYNES,
R. S. PARKER,
Circuit Judges.

IN THE CIRCUIT COURT OF OTTAWA COUNTY, OHIO.

Docket Entries from Appearance Docket No. 2, Page 174.

The Winous Point Shooting Club,
Plaintiff,
v.
Jeppe Caspersen, Peter Petersen, Wm. Decker and Charles Petersen,
Defendants.

APPEAL.

1899, April 7. Appeal bond filed with original papers, viz.:

1899, April 7. Petition filed.

1899, April 7. Precipe filed.

1899, April 7. Undertaking for injunction filed.

1899, April 7. Injunction filed.

1899, April 7. Summons filed.

1899, April 7. Journal entry, journal 10, page 426.

1899, April 7. Journal entry, journal 10, page 548.

1899, April 7. Reply filed.

1899, April 7. Stipulation filed. Journal 12, page 285.

1899, April 7. Journal entry, journal 12, page 160.

1899, April 7. Amended petition filed.

1899, April 7. Decree, journal 12, page 556. See entry.

1899, April 7. Transcript of journal entries filed.

1899, May 29. Motion filed.

1899, May 29. Affidavit filed.

1899, May Term. Journal 2, page 90, continued on application of plaintiff and at its costs.

1900, March 2. Depositions filed.

1900, March 9. Motion for a new trial filed.

1900, April 14. Bill of exceptions filed.

1900, April 14. Journal 2, page 225, bill of exceptions allowed.

1900, April 14. Journal 2, page 119. Decree. Injunction dissolved. See entry.

State of Ohio, }
Ottawa County. } ss.

I, H. B. Bredbeck, clerk of the circuit and common pleas courts in and for said county, do hereby certify that the foregoing is a true transcript of the docket and journal entries of said courts in the above entitled cause, and I further certify that the papers herewith sent, are the original papers and pleadings filed in the above cause of, The Winous Point Shooting Club, plaintiff, against Jeppe Caspersen et al., defendants.

In testimony whereof, I hereunto set my hand and affix seal of said circuit and common pleas courts on this 25th day of June, A. D. 1900.

[SEAL.] H. B. BREDBECK,
Clerk.

IN THE CIRCUIT COURT OF OTTAWA COUNTY, OHIO.

The Winous Point Shooting Club,
Plaintiff,
v.
Jeppe Caspersen, Peter Petersen, Wm. Decker and Chas. Petersen,
Defendants.

BILL OF EXCEPTIONS.

[Filed April 14, 1900.]

Be is remembered, that at the trial of this cause on the sixth day of March, 1900, before the circuit court of Ottawa county, Ohio.

Present: The Hon. George R. Haynes, R. S. Parker, and J. B. Burrows.

The plaintiff, to maintain the issues on its part, introduced in evidence the original answer of defendants in the above entitled case, filed March 30, 1894, which answer is marked, "Exhibit Aa," and is hereto attached and made a part of this bill of exceptions.

Objected to by defendants. Received subject to exception. Defendants except.

And thereupon the plaintiff offered in evidence certified copies of deeds of the property owned by The Winous Point Shooting Club, which deeds are hereto attached marked "Exhibits 1 to 36," respectively, and are made a part of this bill of exceptions.

Objected to by defendants. Received subject to defendants' exception.

And thereupon plaintiff introduced in evidence map made by Surveyor Sylvanus Bourne in 1820 for the U. S. Government found on page 20 in book of "Maps and Field Notes of the Survey in Ottawa county, Ohio," a certified copy of which map is hereto attached marked "Exhibit Bb" and is made part of this bill of exceptions.

And thereupon the plaintiff offered in evidence a certified copy of survey made by Sylvanus Bourne for the U. S. Government in 1820, the original of which is on file in the county surveyor's office of Sandusky county, Ohio, which copy is hereto attached marked "Exhibit Cc" and is made a part of this bill of exceptions.

Objected to by defendants. Received subject to defendants' exception.

And thereupon to further maintain the issues on its part the plaintiff read the deposition of Jared A. Smith, which deposition is hereto attached marked "Exhibit Dd" and is made part of this bill of exceptions.

Objected to by defendants. Received subject to defendants's exception.

And thereupon plaintiff offered in evidence a certified copy of the map which is in the office of the Government at Cleveland, Ohio, made in 1866, by the Government Engineer Brigadier General T. C. Cram, which map is hereto attached marked "Exhibit A," and is made a part of this bill of exceptions. This exhibit was offered in connection with the testimony of Jared A. Smith and is referred to in his deposition as "Plaintiff's Exhibit A."

Objected to by defendants. Received subject to defendants' exception.

And thereupon to further maintain the issues on its part plaintiff offered and read in evidence the deposition of Charles

C. Bolton, which deposition is hereto attached marked "Exhibit Ee," and is made a part of this bill of exceptions.

And thereupon plaintiff offered in connection with Charles C. Bolton's testimony the photographs mentioned and referred to by said witness, which photographs are hereto attached marked "Exhibits B to O," both inclusive. Said exhibits being referred to in said deposition from B to O, both inclusive, which exhibits are made a part of this bill of exceptions.

Objected to by defendants. Received subject to defendants' exception.

And thereupon the plaintiff to further maintain the issues on its part called as a witness,

NATHAN PIERSON,

who, being first duly sworn, testified as follows:

Direct Examination by Mr. Holding.

Q. Where do you live?

A. Riley township, Sandusky county, Ohio.

Q. How long have you lived in Riley township, Sandusky county?

A. About 50 years.

Q. You have been a property owner up there?

A. Yes, sir.

Q. Are you familiar with the location of what is known as The Winous Point Shooting Club grounds?

A. Yes, sir.

Q. Some five or six years ago were you present when these photographs were taken? (Showing witness photographs.)

A. Yes, sir.

Q. I will show you plaintiff's "Exhibit P," and you may state what locality is shown upon that picture?

A. I don't understand these things exactly right.

Q. What place is shown in that picture—what point is it a picture of?

A. I can't tell exactly. I could tell if I knew where they were taken from.

Q. What portion of the grounds is shown there?

A. I don't know as I can tell exactly.

Q. Come as near as you can to the place.

A. I think that is, standing on the river, I think that is east of Squaw Island looking east.

Q. That is east of Squaw Island looking east?

A. Yes, sir.

Q. What do you say as to whether or not that is a correct representation?

A. I think that it is correct.

Q. What do you say as to whether or not that is a correct representation?

A. I think it is.

Q. Do you remember the locality of that place with reference to the river (showing witness picture)?

A. I think that is—

Q. Give your best judgment—if you can remember, place the locality.

A. That does not look exactly here as it does on the marsh.

Cross Examination by Mr. True.

Q. You have been an employee of The Winous Point Shooting Club a number of years?

A. Yes, sir.

Q. Were you with the parties when some photographs were taken in '93, '94 or '95?

A. Yes, I was with them.

Q. Do you remember at that time that they moved their camera away back in the grass in order to get grass in the picture?

A. No, sir.

Q. Do you know where it was placed?

A. Right close to shore—right close to the water.

Q. Do you know the different kinds of aquatic and land vegetation?

A. I can tell—I don't go by that name.

Q. What is this three-cornered grass you see on the picture here (indicating)?

A. You might call that bulrush.

Q. That first grass—do you call that bulrush?

A. Right here?

Q. No, sir, right here (indicating). Bulrushes are a round piece of grass?

A. I guess it is.

Q. What are those—have bulrushes any leaves?

A. No, sir.

Q. Has that grass any leaves on the picture?

A. I don't see them.

Q. Your sight is poor?

A. Not very, no.

Q. You can't see any leaves on that picture?

A. No, sir.

Q. Where was this first picture taken from that you saw here?

A. The first picture was taken from Squaw Island.

Q. On which side?

A. The west.

Q. Are you sure that picture was taken from Squaw Island?

A. I won't be sure.

Q. Was it not Eagle Island?

A. I won't be sure.

Q. Is it not a fact by looking at it you cannot tell whether it was taken from Eagle Island, Bixler's or Winous Point?

A. It is not from Bixler's Point.

Q. There is nothing in that picture that would enable you to recognize Mud Bay territory?

A. I can tell without looking at the picture.

Q. You can't tell by looking at the picture whether it is Mud Bay territory or not?

A. Yes, I can some.

Q. You have known the waters for 50 years?

A. Yes, sir.

Q. Tell the court what part of those waters that is (showing witness picture)?

A. I don't know as I can tell by that.

Q. What is the condition of these waters in the spring season of the year as to vegetation?

A. They are a little open in places.

Q. Beginning at Eagle Island on the east and going west through Mud Creek Bay, is not that free from vegetation in the spring?

A. Not entirely. You will find some bulrushes.

Q. You find them on the Middle Ground?

A. Yes, sir.

Q. And on Bixler's Point?

A. Yes, sir.

Q. Do you find any in the expanse of water between those places?

A. Not exactly in the spring when they are froze out.

Q. Only in August and September when the vegetation is up?

A. Yes, sir.

Q. Do you find any in May?

A. Yes, sir.

Q. And in April?

A. No, I don't think so.

Q. What time does this begin to come up above the water?

A. In May.

Q. What kind of vegetation?

A. Pond lilies.

Q. in May?

A. Yes, sir, they come up to the top of the water.

Q. What season of the year is it the most luxuriant?

A. July and August and the first of September.

Q. There is more grass at that time than any season of the year?

A. Yes, sir.

Q. Those same rushes that grow in Mud Creek Bay grow around Sandusky Bay?

A. Yes, sir, on the shores.

Q. Step to this map and—

A. I don't know anything about that map—I don't go by the map.

Q. Look back at your memory and tell the court the condition of the bulrushes from Canvas Back Point along east, down to the Sandusky Bay to the mouth of the Little Portage.

A. There are bulrushes all along the shore more or less.

Q. And extending out in the bay a half a mile or so?

A. Eight or ten rods some places.

Q. What is the condition of the bay east of Eagle Island—is there some bulrushes going into Sandusky Bay?

A. There is a few.

Q. What about eel grass and wild celery growing along to the Sandusky Bay during the month of August?

A. Not all over.

Q. How much of it?

A. Around the shores.

Q. Over large portions of it?

A. Around the shores.

Q. You have seen boats navigating these waters?

A. Yes, sir.

Q. The boats come up and go into Muddy Creek?

A. Some small boats.

Q. And it has always been used more or less for fifty years?

A. Yes, sir.

Q. What was brought out of Muddy Creek?

A. I have seen scows around about there a good many years ago with wood on.

Q. Would they tack across the bay going down through Muddy Creek Bay to Eagle Island?

A. Generally through the mouth of the river.

Q. And they could sail back and forth nearly from shore to shore?

A. No, sir.

Q. They would get nearer to the shore?

A. No, sir, they never got out of the channel of the river. You mean Mud Creek Bay?

Q. Yes, sir, before they got to Sandusky Bay?

A. Yes, sir, they tacked a little but they could not get to the shore.

Q. West from Squaw Island to Winous Point there is a gradual descent deepening from the shores to the middle and then back?

A. Yes, sir, there is water that goes to the shore and back, of course.

Q. Around all those points, Bixler's Point, Winous Point and all other points along that shore riprapping has been done to prevent the land being washed away by the action of the waves?

A. Yes, sir.

Q. During all the season of the year except August and September there is a broad expanse of water in that bay?

A. Yes, sir, sometimes maybe in the season when there is no vegetation.

Q. And the waters wash those points?

A. They did once but not now.

Q. Do you know the depth of water along in the bay?

A. Not from Long Point down.

Q. You have sailed small boats yourself over all that water?

A. I have a little boat.

Q. You sail all over it?

A. I have a little duck boat.

Q. You sail them all over?

A. Pole them all over.

Q. Have you not sailed them?

A. No, sir.

Q. You have seen fishing boats sail there?

A. Yes, sir.

Q. During the entire fifty years you have known this territory fishing boats have hauled their fish to market?

A. Yes, sir.

Q. What were these fishing boats loaded with that you saw navigating in the waters of Mud Creek Bay?

A. Generally seines and nets like that.

Q. They were sometimes loaded with fish?

A. Sometimes.

Q. Where did they take those fish to?

A. They generally took them to Port Clinton.

Q. And to Sandusky?

A. Yes, sir.

By Judge Haynes:

Q. In how deep water will that acquatic vegetation grow?

A. In four to six feet.

Q. Not deeper than six feet?

A. I don't think so.

And thereupon the plaintiff to further maintain the issues on its part called as a witness,

COL. J. R. BARTLETT,

who, being first duly sworn, testified as follows:

Direct Examination by Mr. Holding.

Q. Are you familiar with the locality of the lands and waters and marshes involved in this controversy?

A. I am.

Q. How long have you been familiar with them?

A. For over fifty years.

Q. How did you acquire that familiarity?

A. By using the waters in hunting, boating and fishing.

Q. How frequently have you been in that locality in those fifty years?

A. During the summer seasons, quite frequently, spring, summer and fall.

Q. How far up Sandusky *River are you familiar with it?*

A. I have general knowledge of Sandusky River from its mouth to its source.

Q. Where do you live?

A. In Fremont.

Q. State whether Sandusky River is navigable as far as Fremont?

A. It is navigable for vessels drawing substantially nine feet of water to Fremont.

Q. Just describe the Sandusky River as it is just above these lands which are described in the petition, the character of the river and the character of its banks.

A. I don't quite understand what you mean by the expression "just above." I can give you a general description of the river in its different localities.

Q. Give a description of the river say a number of miles above these lands.

A. The river has its source in Richland county, on the border between Richland county and Crawford county. It runs in a well defined channel through Crawford, Wyandott, Seneca, Sandusky and into Ottawa county, one continuous channel until it reaches a point at the head of what is known as Eagle Island. There the channel branches, one running off in a northeasterly direction and losing itself in the bay at a point substantially on a line between Slade's Point, which is on the north shore as represented on the map, and the lower point of Eagle Island. The other, which is known as the south channel,

runs off in a southeasterly direction and loses itself in the bay at a point or a line between the east end of Eagle Island and what is known as South Point, being the most extreme point on the south shore. The country through which the river runs until it reaches Fremont is high and the river quite precipitous. There is mostly rapids with occasional pools of deep water, one three or four miles in extent in Seneca county, until at Fremont where you strike the lower rapids of the river. From there down the country becomes more level and the running off to a lower grade as it approaches the mouth of the river finally running into what is known as the Swamp Lands. There are continuous banks of the river close to the channel of the river to a point where Mud Creek empties into the river. There, owing to the flatness of the country, the waters of the river spread out on the east side leaving a flat for a distance between the navigable channel of the river and the shore line. Those flats are covered in a season of vegetation with what is known as aquatic vegetation consisting of deer tongue, arrow tongue, rushes and pond lillies. The surface of the ground under the water on those flats is covered with quite a dense vegetaton that does not reach to the surface of the water but some little distance up in it but the deer tongue, arrow heads and rushes and pond lilies reach above. There is also a species of vegetation called wild celery that grows to the surface of the water and spreads upon the water, and there is another species of vegetation that I don't know the name of that grows to the surface of the water and spreads upon the water so that it obscures the water in many places to a considerable extent. When you get down to where South Creek empties into the river, which is on the right bank of the river and just south of where the river makes its first angle. Probably I can describe that better by saying this: Some half-mile west of what is now

known as Squaw Island the river takes an easterly direction and runs in an easterly direction for about half a mile and then opposite what is known as Peach Island the river makes a sudden bend to the north of the channel and runs off in a northerly direction, probably north by west, until it strikes or crosses rather the mouth of Mud Creek. So it makes a right angle turn and runs east to the head of Eagle Island. On the left bank of the river and running to Squaw Island—and I will say originally and within my first knowledge of it there was no such thing as Squaw Island. Squaw Island was a part of the main land and what is now represented now upon that map as open water between Squaw Island and the point of land just above was all land, and what would be the northeasterly point of Squaw Island extended much further north and east leaving a space between the point of Winous Point and the point of Squaw Island much less than is shown upon that map and much less than it in fact exists at this day. The left bank of the river extends to the lower point of Squaw Island, then comes the tributary of Mud Creek into it, and then turning off to Eagle Island, and owing to the low lands there, there is a flat running off to the east with the shore lines, on the north I mean, and on the right bank of the river when you get, say, by a point of compass, south, maybe south a little east, is where South Creek empties into the river. Then the bank of the river continues on and around what is known locally now as Peach Island and extending around to the east making the south shore and between that and the channel of the river is this Middle Ground that is spoken of, the better portion of which is very densely covered with acquatic vegetation in its season, but originally and when I first knew it there was quite a body of land there that was called marsh. It constituted there a little elevation above the surface of the water at its natural stage and upon

which was a dense growth of cane growing ten feet high or more and, that was very much more extensive than it is at this time, and occupying that portion of this marsh land which was formerly above the water and which has since been worn away and below the level of the water is the densest growth of this aquatic vegetation. The vegetation has taken the place of the original land in that part and the cane has gone of course. There is a little left upon the island now, I think, but not of any consequence, and from that around, taking the swing of the channel, next to the channel of the river the vegetation is very dense and growing up three or four feet above the surface of the water between what was known as Cape Island upon the map and Peach Island, and by the way Peach Island is not an island; it is part of the main land. East of Peach Island is an island, they call it an island, Graveyard Island; between Graveyard and the south shore there are some ponds and there is a little creek through the south shore known as Tommy Creek which is the outlet of these ponds, and to the south of Graveyard Island, as it is called, is land again where upon that map is represented water. I mean those spaces in through here (indicating). South Creek coming down through here. This map is not drawn according to my knowledge of the grounds. This creek (indicating) does not extend to any waters south of it but it drains ponds that lie here and goes no further. This portion here of Peach Island and running across to Graveyard is all solid. The river from its mouth to Fremont is navigable at ordinary stage of water for vessels drawing approximately nine feet of water. That is generally. Of course the bar at the mouth of the river now having been filled some at that particular point, the water is not so deep, but I should say there is an average depth of water from the mouth of the river to Fremont of twelve feet.

By Judge Haynes:

Q. What is its average width?

A. 150 to 200 yards. During the season of vegetation when you get down into the low lands or flats or marshes the navigable channel of the river is well defined by the growth of vegetation upon the channel banks on each side, and that condition exists to the mouth of the river at the lower end of Eagle Island. Eagle Island when I first knew it was a large body of land. It originally contained in the neighborhood of 140 acres. The action of the water has worn away that land so that now probably there is not left all told more than three or four acres that is ordinarily above water. That portion of the island which has been washed away is now occupied in season with a dense growth of vegetation consisting of pond lilies, rushes, flag, deer tongue, arrow head, and other species that I am not familiar with the names of, and that extends east of the island as well as north and south of it and occupies what was originally Eagle Island. The north channel of the river followed close to Eagle Island as it was originally, or as I first knew it, but, owing to the washing away, is a large flat now which is covered with that dense growth of vegetation between the portion that is above the water and the navigable portion of the river. The water after spreading over what is known as the Middle Ground, and on the opposite side of the Middle Ground, and when you come down to Eagle Island taking the course of the north channel, narrows up again so that you get quite a narrow space comparatively between the head of Eagle Island and what is known as Canvas Back Point. This (indicating on map) is designed to represent Canvas Back Point, although they call it Long Grass Point on this map, but the proportionate distance, according to my recollection and knowl-

edge of it, is much less than the scale of this map would indicate. This dense vegetation that I speak of growing over the Middle Grounds grows north of Cape Island and following the channel bank of the river out—

By the Court:

Q. That would be about 800 feet growing on that bank?

A. Probably, but when the river strikes the head of Eagle Island the channel runs very close into Eagle Island so there is very little space between the navigable portion of the river there and the bank of Eagle Island, and then strikes off north again and then off easterly and runs off generally in a northeasterly direction. Opposite to that point and between the channel and what is known as Canvas Back Point there is more of a flat which is covered by dense vegetation that I speak of. Now the water upon the Middle Ground at an ordinary stage of water probably will run from in the neighborhood of three to four feet on the channel bank up to nothing at the shore line. The average depth of water upon the Middle Ground I should say at ordinary stage of water is not to exceed two feet, and there is the same condition of things existing north of the channel of the river opposite to the Middle Ground. There are no channels of free water through the Middle Ground through which you can pass from the bay up to the channel of the river in the vicinity of what is known as Squaw Island, and what is marked on that map as Cape Island channel, being a space between Cape Island and what is called Peach Island, no water channel exists. It is the densest growth of pond lilies and they are the lotus pond lily and yellow lily, the stalks of which are very fibrous, and they grow a number of feet above the surface of the water and they are so woody in their texture that they last almost the whole season round

until the ice carries them away. They are not destroyed by the frost like much of the aquatic vegetation but they stand with their leaves and sometimes with the cones upon them making it impossible during the navigable season of the year, that is when the waters are free from ice, to go through there with a boat of any size, or in the season of vegetation it is almost impossible with the utmost labor to push a little hunting boat with probably a two foot beam and 14 foot length through them, and it is so to a very considerable extent north of Cape Island and from there to the navigable channel of the river. As I said there is no navigable channel and there is no continuous route across the Middle Ground for boats of any size or boats for commercial purposes. I have seen what they call pound boats in there at times but it has been principally in the fall of the year when vegetation was broken down, or in the spring of the year before vegetation has grown up, but those boats are flat bottom and they can only sail with the wind without the aid of a center board. The water is not of sufficient depth to use a centerboard and consequently it is impossible to navigate those parts over any portion of the Middle Ground against the wind. To do that you must have the aid of a center board. I have seen small boats pass over portions of it, little sail boats and duck boats, but the only portion that is navigable for boats of any size is the channel of the river. I believe that is all I desire to say with reference to Sandusky River. I will speak of Mud Creek in connection with it. Mud Creek or Muddy Creek rises in Wood county. It runs through into Sandusky county and some portion of it in Ottawa county and empties into Sandusky River between what is known as the northeast point of Squaw Island and Winous Point. To obviate counsel's objection I will say this, that Mud Creek flows with a well de-

fined channel which connects with the channel of the Sandusky River that I have already described at a point between Squaw Island and Winous Point and the channel of the river at that point where the channel of Mud Creek connects with it is considerably deeper than the channel of Mud Creek. Muddy Creek has a current in it from its source down to where the channel of it intersects the channel of the Sandusky River as I have described it. I also probably should state that the Sandusky River has a current which, unaffected by winds, carries all the water that comes from above down and out through it into the larger waters of the bay. Muddy Creek is navigable for small scows, and small lighters, to a point about a mile above the bridge from Port Clinton to Fremont. Formerly there was a saw mill at that locality from which lumber was carried out of the river and I have seen small scow barges carrying stone up into Mud Creek. They, however, were comparatively small barges that could navigate the channel. I have seen also sailing scows working their way up and I have always discovered, however, that when the winds were adverse the sailing scows came to anchor and waited for a fair wind to go in or out for the navigable channel of the Muddy Creek was so narrow that it was impossible for them to work it by tacking, as they would lose more than they would gain on each tack and consequently they would be compelled to lay by until they had a favorable wind. Coming down and below, we will say down to a point that is locally known as Wolf's Point, which is approximately the point that is marked here on the map (indicating), the banks of the creek run close or are close to the navigable channel of the river. From that point down, the surface of the ground becoming lower, the water spreads out more. The upper body there upon this map is, I take it, designed to represent what is locally known as Horseshoe. Horse-

shoe is a body of land lying upon the left bank of Muddy Creek. The point opposite to Horseshoe is known as Gordon Point. The expanse between those two points is less in fact than the scale of that map would indicate. And then below that and upon the left side of the channel of the river is another point which is represented by that point, and which is largely figurative of a hind leg of an animal, is known as Bixler's Point, and that point runs close to the navigable channel of the river. On the right bank of Muddy Creek, and just east of Bixler's Point is a point that runs to the north. When I first knew it that point was all above water and covered with a dense growth of cane. Frequently in my earlier days it was a favorite spot for me to shoot canvas back ducks. That has since been riprapped by the club, and at the extreme point is some land yet above water, so there is no possibility of boats passing straight through from below this point. A channel runs nearly west until it strikes pretty near that point, then runs off in a northwesterly direction winding around that point and then running off in a southwesterly direction down until it curves around Bixler's Point, and then on up in that direction (indicating on map). Just east of this point, or rather northeast of the point is another bit of land. I don't remember now the local name that is given to that. That is riprapped by the club. It is not represented on this map—this land that stands above the water at the ordinary stage of water. There is some land lying in here in what would be the mouth of Durban Bay as represented by this map that is above the water. The shore line is not so deep as this represents and it comes down to the point here where the club house is.

Q. What is the average width of the channel?

A. Of Mud Creek channel?

Q. Yes, sir.

A. The channel of Mud Creek is not so well defined as the channel of the river. The channel banks of the river are quite nearly vertical but the channel banks of Muddy Creek slope more and slope out to the shore line each way to nothing and then outside of the channel of Muddy Creek too is more or less of vegetation, and the flats between the channel and the shore line has considerable aquatic vegetation but not to the same extent as down on the Middle Ground and that locality.

Q. What was the average width of the channel where these boats in olden times navigated as you stated?

A. Probably 100 yards and less.

Q. I wish you would describe to the court what is locally known now as Mud Creek Bay and the flow of the channel of Mud Creek through?

A. Mud Creek Bay is that expansion of water between Long Point, as we used to call it, and the point where it empties into Sandusky River between Squaw Island and Winous Point —from this point to where Long Point comes in here somewhere through that portion of it (indicating on map) lying east of Long Point. Through that body of water there is a current which carries off the water from above when unaffected by the winds.

Q. Where is Slade's Point?

A. It is a point on the north shore west or north of the east end of Eagle Island.

Q. Where is South Point?

A. It is a point of land on the south shore, south by west, from the lower point of Eagle Island.

Q. Do you know where the pond known as the Lily Pond is?

A. I don't know which one you refer to.

Q. What is locally known as Lily Pond up there?

A. I may not know it by that name but I will say to you this, that there is no portion of that country down there that I am unacquainted with. I have been over the whole of it time and again hunting every part of it.

Q. Do you know where Bunker Hill Point is?

A. Yes, sir.

Q. It is to right of that?

A. Yes, sir.

Q. What kind of vegetation is there—how dense is the growth there?

A. You take all that back in there and Bunker Hill and in through there in seasons of vegetation it is a very good man and a very practical man that is able to push a small duck boat through, and I think that a good portion of the time he would do it by getting out and wading and pushing it ahead of him, if he got through at all.

Q. In this vicinity on this map marked Bunker Hill Bay and around Horseshoe Island and south by Durban Bay, is it open water as represented on this map?

A. No, sir, in times of vegetation there is the densest growth of vegetation in there and north of the channel of Mud Creek with the exception of a channel running part way in between Bixler's Point and the Horseshoe Point. This along here is riprapped along here by the company. There is riprapping on the point of Horseshoe, and on Gordon Point, Long Point, and upon this point here, and here, and at the lower point of Squaw Island around the north and at the lower point of Winous Point.

Q. Do you know whether there is riprapping on Peach Island?

A. And on what is known as Canvas Back Point or head of Eagle Island is also riprapping and I think, if I am not

mistaken, at the lower point of Eagle Island. The shore line from Tommy Creek for quite a distance has been protected by riprapping. Peach Island is also riprapped around so that all that portion of the shore line where there is any possibility of the action of the water wearing it away has been protected in that manner by the club.

Q. I want to show you what is known as plaintiff's "Exhibit P," and you may tell the court if you recognize the point of land that is represented on that picture?

A. Yes, sir.

Q. What is it?

A. The picture looks to what is known as the south shore. To the right of it is shown a body of timber which is known locally as Graveyard Island. I take it that the timber to the left of the picture and in the foreground is a little timber that is at the head of Eagle Island and I should judge from the appearance of the picture that the camera occupied a position on Squaw Island looking south. The dark portion of the picture represents the growth of vegetation bordering upon Eagle Island and between that and what is known as the south channel. The white strip further to the front represents what is known as the waters of the south channel or on some portions what is known as the Middle Ground, as I recognize it. The dark line which is beyond the white strip is the shore line, a representation of the south shore line.

Q. I will show you what is known as plaintiff's "Exhibit Q," and you may state if you are familiar with the location of the grounds represented in that picture?

A. That is a representation of a portion of Middle Ground. No, I am mistaken. It looks to me as a representation of some portion of the territory lying between Eagle Island and the north channel of the river looking to the east.

Q. I will show you plaintiff's "Exhibit R" and ask you if you recognize the location of that picture?

A. Yes, sir, I recognize this. In the perspective of the picture upon the extreme right is a representation of some timbers, some trees that stand on the south shore east of Peach Island. Near the center of the picture is a representation of the growth of vegetation that is taller than that upon each side of it, and that I recognize as being the locality of Cape Island, so-called. The water as shown in the picture I recognize as the channel of the river where it hugs the east side of Squaw Island running north from Peach Island toward Winous Point. The vegetation in the immediate foreground is the vegetation upon Squaw Island between that and the channel of the river.

Q. I will show you plaintiff's "Exhibit S" and ask you if you recognize the locality of that?

A. This in the perspective here shows a line of timber which represents the north shore running in the direction to the right to Slade's Point. Next below the timber is a representation of aquatic vegetation which grows between the shore line and the navigable channel of the river. Then next to that comes more vegetation which is the vegetation growing next to the channel of the river and upon the southeasterly side of that and then towards the right of the photograph is a representation of clear water which extends to the north or northwest of Eagle Island just below where the channel runs through as it is said, between the two Eagle Islands now, not covered by aquatic vegetation, and then in the immediate foreground on the picture comes the vegetation next to Eagle Island so that the picture was taken by the camera I should say on Eagle Island looking northeasterly towards Slade's Point, and the photograph is a representation of the country between the two points.

Q. Showing you "Exhibit T," do you recognize the locality of that?

A. Yes, sir, upon the right of the picture in the perspective is shown a clump of trees or bushes which I recognize as a growth upon Eagle Island, and between that and the aquatic vegetation represented in the immediate foreground of the picture shows the waters between and of the waters between is the channel of the river and showing patches of vegetation, and as you come into the immediate perspective you get a denser growth of vegetation, and looking at the localities here I should say it is a photograph taken by a camera located on some point on Canvas Back Point looking east towards the bay.

Q. Do you recognize photograph marked "Exhibit U?"

A. Yes, sir, I notice in the extreme perspective of the picture there are some trees represented which I recognize as timber upon what or near what is known as Wolf's Point. To the left of that I notice a lot of timber there which is the dimmer dark line which I recognize as the growth of willows marking out what is known as Dutch Gap, being the boat channel dug by the Ottowa County Shooting Club from the river over into Mud Creek for the passage of their duck boats to go to different portions of their hunting grounds. Next below that comes the land and shore of Mud Creek. The expanse of water there at this particular point, the creek being over on the right and obscured by the vegetation in the middle of the picture here, shows a cove that runs around there and that shore line is the west line of that cove and the white line below that is the waters between that shore line and Squaw Island and the water in the immediate foreground and the vegetation is upon Squaw Island. So that I would say to make this picture a camera must have been placed on Squaw Island looking west.

Q. Showing you plaintiff's "Exhibit V," do you recognize that?

A. This is a representation of the south shore line including what is known as Peach Island on the extreme right and Graveyard on the extreme left, and I should say that it must have been taken by a camera in a boat on the Middle Ground looking south.

Q. Do you remember if at any time an artificial channel was made through Eagle Island separating the island into two parts?

A. Not Eagle Island.

Q. You don't remember of a channel having been made through there?

A. I know of no artificial channel being made separating the two Eagle Islands. The only artificial channel I have knowledge of, which now constitutes a channel, is the one that cuts off and makes Squaw Island.

Q. You have spoken of a bar. Where was that bar with reference to Eagle Island—the bar that would obstruct the navigation of the river?

A. It was at the lower point of the channel in the north channel of the river, as I have described it, where a channel enters into the broader waters below and extending west in the channel and across the channel and extending out into the bay is a fan-shaped bar near a line between the lower point of Eagle Island and what is known as Slade's Point.

Q. You may state, if you know, whether these waters and marshes and grounds described in the petition are and have been a resort for wild ducks of various kinds and wild geese and other wild fowl?

A. It has to my knowledge for over fifty years.

Q. What do you know of these waters being a resort for frogs and turtles and whether there is any fish in them.

A. There are frogs and turtles, it is a resort for them, a breeding ground for them. It is also a breeding ground for quite a number of varieties of food fish.

Q. What, if anything, do you know of the habits of the wild fowl that have come in there during their season?

A. We have two species of wild fowl that breed in that ground—the teal and the mallard. The others come and go; of course they are wild in their nature and are easily frightened and the going over the ground and through the marshes in boats has a tendency, and it has in fact frightened large numbers away and frightened them to that extent where it is continued so that many of them never return to the grounds. Years ago, before there was so much of this fishing and setting of nets and constant motion of boats and the like upon the waters, what is known now as Mud Creek Bay, and the head of Sandusky Bay, along the south shore would teem with wild ducks. I have seen in that locality where the waters were so covered with duck, that standing off to look at them as you necessarily must to look at them, you could not see the water and when they arose from being frightened they arose in crowds making a great noise with their wings, there were so many of them. I have noticed since the running over the waters by men engaged in trapping and catching frogs and the like of that that the ducks do not frequent these same waters as much as they did, and when they do come up they do not swing in over the marsh where they were accessible to being shot as they used to but they lie out in the open waters and remain there.

Q. What, if anything, do you know of the manner in which frogs have been trapped in those waters?

A. They are caught by hooks and nets, nets set in the water.

Q. Do you know when the buoys along the channel of Sandusky River were first placed there?

A. I don't remember what year they were first placed, but I remember they were there as early as 1858 because I remember at that time I was the owner of a little yacht and I was passing up and down more or less and using the buoys to keep me in the channel.

Q. Do you know when the Winous Point club house was built there for the club?

A. I think it was about 1858. I know I was a member of the club up to 1861. I don't remember what year I became a member of it but up to say 1861, I was a member and the house had been built sometime before 1860, that is the original house.

Q. What, if any, dominion has the club exercised over these lands and waters described in the petition to your knowledge since 1860?

A. As far as they acquired the property they entered into the possession of it. They have controlled it and protected it from that time and they have been adding to their possessions from time to time, and they have been protecting it by employing men as patrolmen to protect the game or the grounds from trespassers. They have done it by improvements made from time to time and protecting the shores by riprapping and all of this time doing it under the claim of ownership.

Cross Examination by Mr. True.

Q. You are one of the attorneys in this case?

A. I am I guess of record, am I not?

Q. You were formerly a member of the plaintiff in this case?

A. Yes, sir.

Q. And you are an honorary member of the club at present?

A. No, sir, I have not been a member of the club since 1861.

Q. You have been their attorney, however, more or less all of this time you have mentioned?

A. I have been their attorney whenever they employed me—no general employment as their attorney.

Q. You have been their attorney in all their cases?

A. I can't say that because I don't know what all their cases may be.

Q. In all these injunction cases you have represented them?

A. Some of them; I don't know about all of them.

Q. You were attorney in the Winous Point case against Bodi as decided by the Supreme Court?

A. Yes, sir.

Q. Bixler's Point is the southwest point or strip of land running from the southwest quarter of section 21 northeast to the northwest quarter of section 22, which is surrounded by water?

A. I can't say. I don't remember the sections it is in.

Q. Can you step to the map and tell it by the aid of the map?

A. Repeat your question.

Q. Bixler's Point is the southwest point or strip of land and marsh running from the southwest quarter of section 21 northeast to the northwest quarter of section 22 and is surrounded by water?

A. Bixler's Point is in section 21 and it is in the southwest quarter of the section, and I should say the east half of the southwest quarter of the section, the extreme point of it being in section 28, but I can't say it is entirely surrounded by water. I have not been down in that locality for some time but my recollection is that there is a continuous shore line from Bixler's Point down and the whole of it riprapped; there may be some small place where there is a small boat passage that has been left by the club until you get down into the marshes.

Q. Winous Point is the southeast point or a regular body of land and marsh lying mostly in the southern half of section 22 and is surrounded by water?

A. Winous Point lies in section 22 and lies in the southeast quarter of the section but I never knew that it was surrounded by water. I know they cut a ditch in behind there for dramage purposes but there was no natural water-course through there.

Q. Don't you know there is a bridge laid over there on to Winous Point Island?

A. I know there is a bridge crossing the ditch; that is, it used to be so. I have not been back there for quite a number of years.

Q. You don't know what it was in 1893?

A. No, but I know originally there was a ditch through there and a bridge over the ditch, but there was no natural water-course through there.

Q. Long Grass Point or Canvas Back Point is a point of land and marsh extending south from the northeast point of section 22 into the southeast quarter of said section?

A. I can't tell you what the section is. I can only say it is a point of land on the main land northwest of the head of Eagle Island.

Q. You don't know what section it is in?

A. No, sir, and I have known it as Canvas Back Point and not as Long Grass Point but I should judge from the map here it is in section 23.

Q. Slade's Point is a small point of land extending from the main land in the southwest quarter of section 13 and which is a little west of north of Eagle Island?

A. You are speaking of Slade's Point?

Q. Yes, sir.

A. It is a projection of the north shore line at a point northwesterly, or I will say west of north, from the lower end of Eagle Island. What section it is in I can't tell you.

Q. Eagle Island is situated in section 24 and is entirely surrounded by water, is it not?

A. I think Eagle Island is in section 24 and it is entirely surrounded by water.

Q. And the first original survey of the United States Government shows it to contain 144 acres—that is true?

A. I do not think that is correct.

Q. About how many acres?

A. 134 and a fraction, if I am not mistaken.

Q. Now it contains about three acres?

A. Probably.

Q. And it is situated near the center of the south half of section 24?

A. I won't say.

Q. Nigger Head Island is situated between sections 23 and 24 and west of Eagle Island and is smaller than Eagle Island?

A. I don't know any island of that name at all. I know a point of land that is called Nigger Head but that point of

land is a part of Eagle Island. It is now, owing to the action of the water, divided into two parts of Eagle Island.

Q. Peach Island is situated on the north half of section 20?

A. I don't know that all of it is, but some portion of it.

Q. And is separated from a small body of land and marsh lying to the east by what is known as Tommy Creek?

A. That is not correct. Peach Island is not an island. It is the main land and in the rear on the east of what is known as Peach Island and north of what is known as Graveyard Island and west of the bay there are some ponds and Tommy Creek is the outlet of those ponds. These ponds are surrounded by land, Tommy Creek being the outlet.

Q. Is it not a fact that you can go by water through Tommy Creek and around south of Peach Island and into South Creek?

A. No, sir. You may do it in times of flood but not in the ordinary stage of water.

Q. Is it not a fact that all this water in this territory varies about six feet from the lowest to the highest?

A. No, sir.

Q. Is it not a fact the winds blowing from the northeast cause the waters in this territory to rise about three feet?

A. No, sir, I don't think it does.

Q. How much?

A. It causes them to rise. There may have been times down here in extreme weather when you got an elevation of water from the northeast blows of three feet but that was at a time before the Lake Shore had built their bridge across the bay and at a time when the wind had a sweep of the whole bay so it could move the waters rapidly, but since the bridge has been built there are only a few waterways left through

which the water can pass and consequently it takes longer to raise the water west of the bridge than before. It will pile up on the east side of the bridge, and consequently you do not get as much to raise the water from the northeast winds as you did.

Q. And when it does rise it is correspondingly slow in running out?

A. Yes, sir.

Q. The average would be the same?

A. I don't know as that would be so. The winds do not raise it as much as formerly.

Q. The southwest winds in this territory will cause the water to lower three feet?

A. Not that much, but during the heavy southwest winds they become lower, and sometimes when the winds are so extreme and blowing for that length of time that all of these flats we have spoken of and the lower country outside of the river channel has been free from water.

Q. And when the water is high they are all submerged?

A. Yes, sir, I have seen them submerged.

Q. How far does the water of Sandusky River rise and fall with the lake here—to Fremont?

A. They will rise by the action of the winds and fall as far as Fremont.

Q. How far is Fremont from Eagle Island?

A. Substantially twenty miles.

Q. Coming down Sandusky River from Fremont the banks are well defined for some distance?

A. Yes, sir.

Q. At what point coming down the river does the banks of Sandusky River become submerged?

A. Where it empties into the bay down at Eagle Island.

Q. Is that the first point they become submerged?

A. Yes, sir, as I take it.

Q. Do you know what the bank of a river is?

A. I think so.

Q. What is it?

A. It is that portion of the land at the margin of the river.

Q. It is land or water?

A. Land.

Q. Will you tell where the land bank begins or where the water bank begins?

A. I don't know of any water bank of Sandusky River.

Q. At what point does the so-called bank you have described become submerged coming down the river from Fremont?

A. I don't understand that the banks of the river are submerged at all.

Q. They are under water?

A. No, sir. My knowledge is—I speak from that alone—when you come down to this lower country, the water spreads further over and leaves a flat between the channel and the shore line and consequently makes it wider from shore line to shore line but there is the shore bank there just the same.

Q. From that the banks of the river when they come down into what is known as the swamp lands, the river itself spreads out and the banks follow the main land around?

A. Yes, sir, but your illustration of the main land is not right.

Q. When it meets here (indicating) and spreads out in the marsh land the bank of the river would follow the land around there?

A. That is not true of the river there.

Q. At what point does the banks become submerged and the river spread out?

A. I say there is no point, as I understand it, at which the banks of the river become submerged, but I say there is a point at which there is a spreading out of the waters so as to make a wider flat between the channel of the river and the shore, that you will get on the east side of the right bank of the river down at the lower part of Peach Island and running off here leaving the flat across. On the west side, or the left bank of the river, you don't get it at all, this here (indicating) not being a natural channel through here, not until you get to the mouth or beyond the mouth of Mud Creek.

Q. Where is the north bank of Sandusky River north of the Middle Ground?

A. It is on the line where the water and the land joins north of the channel of the Sandusky River.

Q. You don't mean to convey the idea that the bank of the river is the bank of the channel?

A. No, sir. I say this: That there is a channel bank which is submerged, that is always submerged at the ordinary water stage, and then comes the shore line or bank of the river. Now this channel bank and shore line is well marked from the mouth of the river to Fremont and you will find a flat between the channel of the river and the bank of the river almost entirely up to Fremont. There are some places where the channel will get close to the bank and will leave no slope but with that exception there is a deep channel with almost vertical banks and then a slope away to the bank of the river and all the way up you will find the slope covered with aquatic vegetation and you will find the channel defined where the bank is defined by flats on the side of the river.

Q. Where is the north bank of Mud Creek coming from Horseshoe Island to Winous Point?

A. I can't locate it on the map but I can say to you that it is that point where the water joins the land, where the land at the ordinary stage of water rises above the water.

Q. That would be the bank of Bunker Hill Bay?

A. No, sir, not necessarily.

Q. Would it be Bixler's Point?

A. Bixler's would be one of the banks there. There are channels that run back from Mud Creek back into the marshes there—outlets of the marshes that you are trying to make Mud Creek Bay.

Q. Where are these shores of the so-called Muddy Creek between Horseshoe Island and Winous Point?

A. I have said to you that I cannot mark it upon your map, but it is that point where the land and the water join or that point where the land rises above the water at ordinary water stage.

Q. After you get to Squaw Island you find a large bar across the Sandusky River, or before you get to Squaw Island coming down the river?

A. No, sir, not across.

Q. How far across?

A. At the southeast point of Squaw Island where the river makes a sharp bend to the left running north there is a point butting out there that shoals out to the channel of the river and probably there are some accumulations in the channel, but the point is so extremely sharp that it is very difficult for vessels to round it, and the point has been dredged off by the United States at one time and buoys set there to mark the point in swinging around the curve.

Q. Below that part and opposite the mouth of South Creek there is a large territory known as the Middle Ground?

A. No, sir, the Middle Ground is some distance below South Creek.

Q. Does it not lie almost north of South Creek?

A. It is east of South Creek, but it is quite a distance. South Creek empties into the river south of Squaw Island.

Q. At that point the waters of Sandusky River come down near Squaw Island and the waters of South Creek join the waters near Peach Island?

A. The Sandusky River runs east until it strikes Peach Island, or nearly east, and then it makes an angle more than a right angle.

Q. Do you claim it comes clear over to Peach Island?

A. That location is not right.

Q. You say now the Sandusky River channel comes over to Peach Island?

A. I say the channel of Sandusky River back or above here runs almost due east to Peach Island.

Q. And then it is joined by something?

A. No, sir, and then it makes a very sharp turn and runs off to the north hugging the east side of Squaw Island close.

Q. How far is it from Peach Island to Squaw Island?

A. 150 yards.

Q. There is a large deposit opposite Squaw Island to the east known as the Middle Ground?

A. Yes, sir, to the east.

Q. Directly in line of the channel going eastward?

A. No, sir.

Q. Don't you say the channel bank comes over to Peach Island and then goes north?

A. That would not put it in line. I know Peach Island makes an obstruction to it going east.

Q. And the Middle Ground?

A. It turns before it strikes the Middle Ground and it runs along Peach Island north before it reaches the Middle Ground.

Q. Is not the Middle Ground a deposit of sediment coming down Sandusky River and South Creek?

A. I don't think so.

Q. What has caused it then?

A. That is more than I can tell you, but there is no current in that direction to make a deposit, to carry a deposit to that point. There are no accumulations there by way of deposit, but there has been derelictions by the action of the water, and the ground that formerly stood there above the water has been almost entirely washed away by the action of the water for a period of years.

Q. The description you were giving of this territory being covered with aquatic vegetation was during the months of August and September of each year?

A. Not entirely, no.

Q. What months?

A. I am speaking from the time that vegetation begins to grow until it is cut down by the frost of the early winter.

Q. The vegetation in that locality does not come above the surface of the water until July?

A. Yes, sir, some of it does, considerable of it, early in June and the latter part of May.

Q. From the time the ice thaws in the spring until vegetation comes up it is a broad expanse of water?

A. I will say so. Now I will explain. There is vegetation that grows there that is not entirely killed by the winter

and by the ice and that vegetation continues and is covered up by the vegetation of the succeeding year and to the extent that that exists there is not a free expanse of water. It is true that in the early spring and before the great mass of vegetation springs up that there is a surface indication of a much greater expanse of water than you get in a season of vegetation.

Q. In the spring season you have been speaking of there would be no grass at all between Nigger Head and Canvas Back Point above the surface?

A. No, sir.

Q. And from Winous Point to Bixler's Point there would be none?

A. There would be none in these waters outside of the shore lines except in the waters I spoke of where there was a heavy growth of pond lilies.

Q. Between Canvas Back Point on the north and the mouth of Tommy Creek on the south there is no vegetation during the spring?

A. There is none above the surface of the water in the early spring.

Q. Between Squaw Island on the east and Bixler's Point on the west is there any vegetation in the spring?

A. Not out in the water, that is there is none visible above the surface of the water. There is a vegetation that commences its growth very early in the spring and there is quite a considerable vegetation of that kind along the waters that exists during the whole season of vegetation, but it don't make its appearance above the water until the latter part of May or the forepart of June, and then it continues to grow and becomes very dense.

Q. Does that condition of things exist in Sandusky Bay?

A. No, sir.

Q. Is not that covered with grass during the entire summer?

A. No, sir, in Sandusky Bay the grass is what is known as eel grass or wild celery. It is a vegetation that will grow in six to ten feet of water, maybe more, but it comes up with a spiral formed stalk until it reaches the surface of the water. It does not grow above the surface of the water but it rests upon the surface of the water and it has to some extent ribbon leaves that float upon the surface of the water, but down in the bay you get none of this aquatic vegetation outside of that that you get above.

Q. You get it all around the shores of the bay?

A. No, sir, not all around.

Q. How far down Sandusky Bay beginning from Canvas Back Point do you find it?

A. From Canvas Back Point along the line you will find rushes growing until you get down to Slade's Point and below and then when you get down to the vicinity of the Little Portage, which is quite an indentation along the shore of the bay there, the growth of rushes is quite dense and fills up that cove that is made there near the mouth.

Q. How far do you say this extends out into Sandusky Bay?

A. I don't know; I never looked at it for the purpose of determining the distance it extended out, but I only know in a general way there was quite a body of rushes lying in that vicinity.

Q. How is it on the north shore?

A. Until you get down to near the bay bridge you get some.

Q. And around Johnson's Island?

A. Yes, sir, around in the lower bay.

Q. It is the same vegetation that grows in Sandusky Bay that grows in Mud Creek Bay?

A. No, sir.

Q. You can find vegetation that grows in Mud Creek Bay that does not grow in Sandusky Bay?

A. On the south shore of the bay in the vicinity of Coon Creek and what the boys know as the "Dewdrop" there is a line of rushes running along there and down to Walker and extends out 8 or 10 rods from the shore line and you run down 8 or 10 rods and you get no rushes at all. Answering your question as to how the vegetation corresponds between Sandusky Bay and Mud Creek Bay out, there is some of this eel grass or wild celery that grows in Mud Creek, in the expanse of water that is commonly called Mud Creek Bay, and that is the same kind of vegetation you will find down in Sandusky Bay but there is other aquatic vegetation that grows up in Mud Creek that you don't get down in Sandusky Bay.

Q. What is it?

A. It is flag, deer tongue, arrow head and pond lilies.

Q. Don't you find all that down near the mouth of the Little Portage?

A. You will find it back.

Q. Do you find it outside?

A. No, sir, you don't.

Q. And all through north of Eagle Island in the bay there don't you find pond lilies and deer tongue?

A. That growth that is around Eagle Island I don't think it extends out in the bay any further than Eagle Island originally extended.

Q. It extends a long distance beyond what is now known as Eagle Island?

A. It extends a distance outside and beyond what is above the surface of the water at the present time.

Q. You said ducks were much more numerous in this locality before the fishermen were fishing there; were not the fishermen fishing there without interruption years ago?

A. No, sir.

Q. Did not they fish there without being interrupted at all about fifteen years ago until the club tried to prevent them?

A. It is only a few years ago since they were using the twine they now use in staking out.

Q. So the logical conclusion is that they were frightened

Q. What nets did they use formerly?

A. I think formerly they used drag nets. I don't think they used any set nets in the early day.

Q. In these seven cases now before this court is it not a fact the defendants were fishing seines and no other kind of nets?

A. I don't know.

Q. And did not they haul them in season when there were no ducks there?

A. I don't know.

Q. Is it not a fact that the ducks have been driven away by the banging away of the hunters?

A. That has been contributive.

Q. And the constant chasing around?

A. I don't think that has as much effect as the disturbing of them upon their feeding grounds and particularly in the night time. If you let the ducks be so they will feed they will be more apt to stay but if constantly chased off their feeding grounds they will get discouraged and stay away.

Q. The feeding grounds is where they come to capture the game?

A. Yes, sir, or in that vicinity.

Q. Is it not a fact that pound nets and the cork buoys decoy ducks and have you not seen them decoyed in that manner?

A. No, sir.

Q. Have you not shot ducks by getting in a pound net and using it as a blind?

A. I suppose that you may erect a structure like making a blind, if you please, and in course of time the ducks will be so accustomed to it they will not shy from it but they always act as though they were suspicious of it.

Q. But they never get accustomed to being shot?

A. No, sir.

Q. So the logical conclusion is that they were frightened much more by being shot at than by any fishing device?

A. I don't think that is a logical conclusion.

Q. Give your conclusion?

A. I said it was the disturbance of them. Of course there are fewer ducks than there were years ago. Years ago there was not as much chasing after them as now. Years ago they shot mostly with a muzzle loader. They were not constantly banging away, and you take the majority of the persons who are shooting ducks and I think there is at least 20 shots that go for nothing.

Q. That is confined to club hunters?

A. Not always confined to club hunters; some fellows like you come; and ducks being migratory they pass from one part of the country to another and there was a large section of the country in the early day that they were not hunting over at all and there they would breed and they returned to us in larger numbers than they do now, but now they are hunted

from one part of the land to the other. They must have quiet and rest, and they will not permit association; they are wild.

Q. Do you say teal and mallard ducks breed there?

A. Yes, sir.

Q. What per cent. of the teals and mallard breed there?

A. I don't know.

Q. What per cent. do you think?

A. I said I could not tell you.

Q. One per cent. or one-half per cent.?

A. I said I don't know.

Q. Is it not a fact that a very small per cent. of the mallard duck breed in these marshes?

A. I would say that most of the mallard duck do not breed here, but I am not prepared to say that a very much larger percentage would breed here if they were let alone.

Q. You mean by the hunters?

A. I mean everybody.

Q. I suppose that the individual that pursues them makes no difference—it is just the pursuing of them?

A. It is the disturbance of course.

Q. A very small per cent. of the teal duck breed here—they just stop here going north and south?

A. I think a great majority of the teal breed in these localities. I don't mean right at the head of the waters of the bay but you will find them over there.

Q. The breeding grounds are back in this territory we call Mud Creek Bay now?

A. They do not breed out in the open water.

Q. They all breed in the marshes down on the map here?

A. Over in where they have protection.

Q. There are no ducks that breed in this territory where those fishermen fish?

A. There are no ducks that have their nests on the water outside of the shore line.

Q. You said you used to sail down there with a boat years ago, and that you found your way down through the waters and towards the channel by reason of the government buoys?

A. I don't know as I said exactly that, but I said there were government buoys there and I remember it because I used them in sailing at that time.

Q. They were placed there to mark that channel through that expanse of water?

A. They were placed there by the government for the purpose of marking the deepest navigable channel for the aid of commence, because in the early days there was quite a trade from Fremont out.

Q. And there was a large trade up to Muddy Creek?

A. Not a large trade.

Q. About how many scows traded up there?

A. Two or three maybe that ran there regularly. For a number of years nothing has been going on there.

Q. They sailed up Mud Creek Bay?

A. If there was a wind behind their quarter they would sail down and if the wind was unfavorable they would stay until it was favorable.

Q. Did you see them tack?

A. I have seen them try to get out, to work against the wind, but I never saw them accomplish it with any degree of success.

Q. You have seen them sail with pound boats over this territory?

A. Below I have but not so much up there.

Q. Between Squaw Island and Winous Point?

A. More particularly below there.

Q. And between Canvas Back Point and Squaw Island you have seen them sailing all through there?

A. No, sir.

Q. All except the shore?

A. No, sir, there is a considerable expanse of water outside of the shore line they cannot sail because they actually draw too much water for that. On portions of the Middle Ground they could sail when the winds were fair.

Q. You have seen them sail skiffs all over that territory?

A. I have seen them row the small boats and running trap lines and seines.

Q. Did you ever see any nets above that?

A. No, sir, with the exception of one year above the Winous Point Club.

Q. These pound nets were always set in deep water, were they not?

A. I don't know as they were set particularly in deep water, but I presume where the fishermen thought there was the best chance of catching fish.

Q. You know they are set on stakes and have a lead that runs down—I mean a fyke net—that would require three or four feet?

A. It would depend upon the size of it.

Redirect Examination by Mr. Holding.

Q. What is the width of the cut between the two portions of Eagle Island?

A. I don't know. There is some considerable distance there that has grown up by aquatic vegetation but the land has been washed away below the surface of the water.

Q. Can you reach Winous Point from the main land without crossing any other water except this ditch that you have spoken of?

A. From the main land, no.

Q. Is there any other water course besides this ditch you have spoken of between the main road and Winous Point Club house?

A. Not that I know of.

Q. How familiar are you with the rivers along the south shore of Lake Erie and Sandusky Bay?

A. Do you mean from Sandusky Bay down towards Cleveland?

Q. Yes, sir.

A. Not much. I know some of them and know the character of them at the mouth.

Q. What has been your observation as to the effect of the winds upon those rivers in lowering or raising the water?

A. It always is a principle if the river is navigable, in fact to be navigable and have a navigable channel the waters must be on a general level in the river and the larger body of water into which it empties, and that being the case the wind will affect the water to a greater or less extent, but in rivers where there is a fall at the mouth of the river descending into the larger body of water, the waters in the smaller body would not be affected by the waters outside. When the wind is blowing from a certain direction it will carry the water above and pile it up and raise it and when it is in an opposite direction it will carry it down again and consequently it will make a current in that way. It is characteristic of this and every river on the lake here. It is characteristic of every river that I have any knowledge of that can be navigated from a larger body into which it empties.

By the Court:

Q. That is because the heavy winds bring the water all up this way, the whole body of water?

A. Yes, sir. In the Maumee Bay up there you will find in the fall of the year a low stage of water and at Buffalo, at the lower end of the lake, you will find it correspondingly high. The winds sweep it back, but there is no ebb and flow of the tide that affects the height of the water, but after those winds there is a constant current that carries all the water from above.

Recross Examination by Mr. True.

Q. I hand you plaintiff's "Exhibit T," and ask you on what point the camera was placed when that photograph was taken?

A. I wish to correct a statement that I made a short time ago in reference to the approach of the Winous Point Club house. There is a swale running across at one point where it has been built up and a roadway made across the swale but there is no channel of water anywheres in the rear of the point.

Q. There is a swale between the land upon which the Winous Point Club house is situated and the mainland?

A. Yes, sir.

By Mr. Holding:

Q. Is it perfectly dry there and is there no water there?

A. Unless it is unusually high water it is always dry.

Mr. True, continuing: Where was the camera placed to take that photograph?

A. I don't know; I was not present when it was taken.

Q. From what point are you looking to determine the direction in which that was taken?

A. The point of the compass?

Q. You said a while ago that the camera was in a certain position and you were looking in a certain direction; tell that over again?

A. I think I said to you, and that is my opinion of the thing now, that the camera in the taking of this picture must have been placed upon some point upon Canvas Back Point looking east, and that the clump of timber on the right of the picture there was timber upon Eagle Island, and the water in front was the water of the north channel of the river showing the vegetation upon each side of it. I think it is the same picture that you said was looking west when I said east from the mouth of the river.

Q. If you said that this was from Eagle Island looking south, would that be correct?

A. If I said it was from Eagle Island looking south, would that be correct? No, I don't think this is a picture looking from Eagle Island south.

Q. Where do you say the camera was placed?

A. I said upon some point.

Q. What point?

A. I should say some point near Canvas Back Point.

Q. What do you say that clump of trees is there?

A. I said that was on Eagle Island I think.

Q. And which way were you looking?

A. East, or substantially east.

Q. You can't tell from what point you were looking?

A. Nobody can locate the camera.

Q. You did before?

A. I said I should think it was from some point on Canvas Back Point that the picture was taken.

Q. I hand you "Exhibit S." At what point was the camera placed to take that photograph and in what direction is the view taken?

A. The view is taken in a northeasterly direction.

Q. From what point?

A. From some point on Eagle Island or on a boat in the vicinity of it—I won't say it is on dry land—and looking in a northeasterly direction following the north shore line there in the direction of Slade's Point.

Q. You were looking in an easterly direction?

A. No, sir, I said northeasterly.

Q. If you said west before you were mistaken?

A. I did not say west before.

Q. I see the map says west?

A. I can't help that.

Q. I will hand you "Exhibit R," and ask you to tell where the camera was placed when that was taken, and in what direction the view was taken?

A. I can't tell you where the camera was placed, but it is a view looking from the vicinity of Squaw Island east and on the right of the picture shows some of the timber on the south shore and in the center is some vegetation showing the highland, being Cape Island, and the waters in the immediate foreground are the waters of Sandusky River losing sight of them by the growth of the vegetation hiding them along Squaw Island.

Q. Now I hand you "Exhibit Q" and I will ask you what point that camera was placed in taking that photograph and in what direction the view was taken?

A. I can't tell you where the photograph was taken but it looks to me like a picture of a portion of the Middle Ground

and I should say looking in a north or northeasterly direction, in a northeasterly direction more particularly.

Q. Where do you think the camera was?

A. I can't say where the camera was. It may have been on a boat in the river.

Q. If you said before that was looking out toward what you call the mouth of the river would that be correct?

A. That would be looking north towards the mouth of the river.

Q. I hand you "Exhibit P" and ask you to tell us where the camera was placed when that view was taken?

A. I should say that that was a picture taken from Eagle Island looking south to the south shore.

Q. I will hand you "Exhibit U" and ask you where the camera was placed when that photograph was taken?

A. You are asking me a question that is impossible for me to answer—where the camera was placed. But this is a picture representing a view looking from some portion of Squaw Island west.

Q. If you said before that was a view taken from a boat south of the Middle Ground looking toward Canvas Back Point, were you correct?

A. Do you assume that I said so?

Q. I am not testifying.

A. I did not say so.

Q. Did you say so?

A. No, sir, I did not.

Q. Are you sure of that?

A. Yes, sir.

Q. Which view did you say was taken from a boat south of the Middle Ground?

A. I did not say any was taken from a boat, I said one might have been taken from a boat.

Said Exhibits P to V, both inclusive, introduced in evidence.

Defendants object. Received subject to defendants' exception.

Wednesday, March 7th, 1900.

And further to maintain the issues on its part, the plaintiff introduced

EDWARD MACKEY

as a witness, who testified as follows:

Direct Examination by Mr. Holding.

Q. Where do you reside?

A. Port Clinton.

Q. What is your business?

A. Laborer.

Q. At one time you were patrolman for the Winous Point Shooting Club, were you not?

A. Yes, sir.

Q. When was this?

A. I worked for them about ten years, up to about two years ago.

Q. Were you their patrolman in 1894?

A. Yes, sir.

Q. Were you in their employ in 1893?

A. Yes, sir.

Q. Did you have any knowledge of Jeppe Caspersen, Peter Petersen, William Decker, and others fishing up there?

A. Yes, sir.

Defendant objects. Court holds question unnecessary.

Q. Mr. Mackey, are you familiar with the location known as Slade's Pond?

A. Slade's Pond or Slate's Point?

Q. Slade's Pond.

A. No, sir, I do not know of any pond by that name.

Q. What is the name of the pond up in the northeast corner of Section 14? Or the southeast corner of Section 14?

A. The channel runs up there called Slade's Pond channel.

Q. And is that connected with the other waters that flow into Sandusky Bay through the river?

A. It empties into the bay. The channel runs out into the bay from the upper marshes.

Q. Now what is the depth of water, do you know, in that pond, the ordinary depth of water?

A. Oh, from six to ten inches.

Q. What do you say as to whether or not it has at all times water in it?

A. Sometimes it does and sometimes it does not. I saw it when you could walk right over it with shoes on.

Q. Have you any knowledge of the location that is called locally Mud Turtle Hole?

A. Yes, sir.

Q. What section is that in, if you know?

A. 23, I think.

Q. What is the ordinary depth of water in that which is known as Mud Turtle Hole?

A. It varies from one inch to six or eight inches, sometimes two feet, on account of whether the water is high or low.

Q. Have you any familiarity with the location of what is known as Great Goose Pond, Chapin's Bayou?

A. Yes, sir. (Witness points out locations on map.)

Q. In what section is that, Mr. Mackey, if you remember?

A. Goose Pond is in section 23.

Q. Where is Chapin's Bayou?

A. About the line of sections 23 and 22, I do not know for sure.

Q. What is the ordinary depth of water in these two places?

A. Well, from an inch to two feet, sometimes three feet in high water, and in low water no water at all sometimes.

Q. At the ordinary stage of water?

A. Well, from an inch to a foot.

Q. You made measurements and soundings in 1894, did you not?

A. Yes, sir.

Q. Now take Little Goose Pond, what was the depth of water in that pond?

A. At the time I made the soundings?

Q. Yes. That is in section 23?

A. There was no water in there at all.

Q. What is the ordinary depth of water?

A. Well, in some years it varies. That year was high water. In low water years there is no water in many of the ponds. In other years I could run all over it in a boat.

Q. What is the ordinary depth of water during the time that you have known the locality there?

A. Oh, I think from six inches to a foot.

Q. What is the depth of Big Channel and Goose Channel?

A. About two feet. Eighteen inches to two feet.

Q. That is in what section?

A. Twenty-three.

Q. Do you know where Earl's Pond is?

A. Yes, sir.

Q. By the way, these waters are all given local names, are they not?

A. Yes, sir.

Q. Earl's Pond is in section 22, is it not?

A. Yes, sir.

Q. What was the ordinary depth of water in Earl's Pond?

A. It varied. There is a kind of deep channel up through it. It varied from eighteen inches to two feet.

Objected to by defendant. Objection overruled.

Q. Do you know where Little Channel is, Mr. Mackey?

A. Yes, sir.

Q. That is on the section line between sections 22 and 23, is it not?

A. Well, it is in both sections I think.

Q. About what is the ordinary depth of water in that channel?

A. A foot to eighteen inches.

Q. Do you know where Lucy's Pond, Bay Tree Pond, West Passage, and Sadler's Pond are?

A. Yes, sir.

Q. In sections 15 and 22 are they not?

A. I am not sure about that. It seems to me it is 21, is it not? There might be some of Lucy's Pond in 15.

Q. Sadler's Pond?

A. That is in 15.

Q. Bay Tree Pond?

A. Some I think are in 22. That is, part of the ponds.

Q. What is the ordinary depth of water in these places?

A. Oh, from eight to ten inches.

Q. Durbin's Pond, in section 22, what is the depth of the water there?

A. Well, Durbin's Pond is quite a big pond. There is three feet of water in some places in it.

Q. What is the ordinary average depth of the water there?

A. I should think from two feet to two and a half feet.

Q. Lily Pond, do you know where that is?

A. Yes, sir.

Q. In section 21, is it not?

A. Yes, sir.

Q. What is the ordinary depth of water in that pond?

A. Eight to ten inches.

Q. And in Lily Pond Channel and Muskrat Pond?

A. In Muskrat Pond there is six to ten inches, Lily Pond Channel, 18 inches.

Q. By the way, in Durbin's Pond is there not an island called Durbin's Island?

A. Yes, sir.

Q. Can you point out Durbin's Island on this map?

A. I could show you where it ought to be.

Q. Do you see it there?

A. It is right about in there, I should think. (Pointing to map.)

Q. Is there any such island on the map?

A. No, sir.

Q. Is there what is known as Porter's Point and Darlington's Point in sections 22 and 21?

A. I do not know where Darlington's Point is, but I know Porter's. The other might have a different name.

Q. Where is Darlington's Point? Do you see that on the map?

A. No, sir, it does not show any such point, I do not think.

Q. Sausage Island? Do you see any Sausage Island?

A. I am not familiar with the name.

Q. What are these islands in Lily Pond called?

A. They are artificial islands. I never heard of any name for them.

Q. Do you know where Stager's Bayou is?

A. No, sir.

Q. Nolan's Bayou, Green Wing Bay?

A. No, sir.

Q. What do you know of that bay lying west of Bunker Hill Pond?

A. Bunker Hill Pond? To the west of that is Horseshoe.

Q. Does not Horseshoe lay west?

A. West of Bunker Hill.

Q. Bunker Hill Pond is in what section?

A. 21, I think.

Q. What is the ordinary depth of water in that pond?

A. From eighteen inches to two and a half feet.

Q. Horseshoe Pond, in what section is that?

A. I think some is in 20. 21 and 20 I think.

Q. Now do you see any Horseshoe Pond indicated on this map? If so, point it out?

A. (Witness points it out on map.) That is it, back of Horseshoe Island, here.

Q. What is the ordinary depth of water in Horseshoe Pond?

A. From two feet to three or three and a half, probably.

Q. Do you know where Gardner's Bayou is?

A. No, sir.

Q. Pintail Bay?

A. No, sir.

Q. Do you know where Leonard's Bay is? That is in section 22?

A. I do not know exactly. I do not think I do.

Q. Standard's Pond, do you know where that is?

A. No, sir.

Q. Do you know where Mallard Bay is?

A. No, sir.

Q. Did you ever make any measurements or soundings in the channel of Muddy Creek?

A. Yes, sir.

Q. What is the ordinary depth of water in the channel of Muddy Creek?

A. I should think four feet. It varies. In what is known as Mud Creek Bay—

Q. I am speaking of the channel?

A. About four feet I think.

Q. And in Muddy Creek Bay, what is the average depth of water outside of the channel?

A. It varies from the shores from six inches to three or four feet.

Q. What is the average depth of water in the Middle Grounds?

A. I should think about two feet.

Q. The average depth of water in the channel of the Sandusky River?

A. I should think from about ten to twelve feet.

Q. Now the main channel of the Sandusky River, what is the average depth of the water there, where it runs off to the northeasterly?

A. From Eagle Island? About twelve feet, I think.

Q. And in the South Channel?

A. It is about ten feet.

Q. Do you know where Little Tommy Creek is?

A. Yes.

Q. What is the width of Little Tommy Creek?

A. About 20 feet. Fifteen to twenty feet.

Q. What is the depth of the water ordinarily?

A. About eighteen inches.

Q. Are you familiar with the location of Fayette Bayou?

A. Yes, sir.

Q. What is the depth of water in Fayette Bayou?

A. Eight to ten inches.

Q. In Island Pond, what is the depth of the water there?

A. Eight to ten inches.

Q. Graveyard Island Channel? This is in section 26?

A. Graveyard Island Channel? I do not know of any channel by that name.

Q. That little channel by what is known as Graveyard Island?

A. The channel that goes between the two islands?

Q. Yes, sir. A little south of it. Between that and Peach Island?

A. I do not know of any channel there.

Q. Peach Island Pond, do you know where that is?

A. Yes, sir.

Q. What is the depth of water in that?

A. From eight to ten inches.

Q. That is in section 26?

A. I do not know; could not say.

Q. Peach Island Channel, is that still there?

A. Yes, sir.

Q. What is the depth of water there?

A. About eighteen inches.

Q. Do you know where Teal Pond is, in section 27?

A. Yes, sir.

Q. What is the depth of water in that?

A. About six inches, I should think.

Q. And in South Creek, what depth has that water?

A. About two and a half to three feet. I should think in the channel about two and a half feet.

Q. And that is the deepest place?

A. Yes.

Q. What does it run out to?

A. The further you get out the shallower the water.

Q. Speaking of toward the shore line?

A. It gets shoaler towards the shore line too.

Q. How shoal?

A. Six to eight inches.

Q. What is the width of South Creek?

A. I do not know, hardly. Some places a good deal narrower than others. Some places probably twenty rods and some places sixty rods.

Q. Are there any islands in it?

A. There are some islands along the banks of it.

Q. What is the width of the channel of South Creek?

A. I could not say.

Q. Just approximate it, Mr. Mackey?

A. Where it empties into the Sandusky River I should not think it is over six or eight rods.

Q. And where does it empty into the Sandusky River?

A. At Peach Island.

Q. And how wide is it from there south?

A. It gets wider at the south, and it must be forty rods in some places.

Q. How wide is the channel?

A. I could not say. It is quite a deep pond, and I could not say anything about the channel.

Q. It spreads out, doesn't it, in the vicinity of Bartlett Island, and then narrows down to a narrower stream?

A. Yes, sir.

Q. What is the average depth of these waters to the south of Peach Island Channel in sections 34 and 35?

A. Well, they vary from an inch to a foot, I should think.

Q. Do you know where Fox Island Bayou is?

A. Yes, sir.

Q. And Big Bayou?

A. Yes, sir.

Q. And South Creek Bayou?

A. Yes, sir.

Q. These are in section 34, are they not?

A. Yes, sir.

Q. What is the depth of water in these bayous?

A. Oh, from a foot to eighteen inches.

Q. And is there water in them all seasons of the year?

A. Most all seasons.

Q. Do you know where Green Creek is?

A. Yes, sir.

Q. Into what does it empty?

A. Sandusky River.

Q. What section?

A. I could not say.

Q. What is the width of the channel of Green Creek, say in section twenty-eight? Just before it empties into the river?

A. I could not say.

Q. Now take Raccoon Creek, from in section 25. What is the width of the channel of it?

A. At the mouth of it?

Q. Yes, out where it empties into the bay?

A. About forty feet, I should think.

Q. And from there up in sections 25 and 34?

A. Well, it spreads out as it gets up into the marsh.

Q. What is the average depth of water before you get to the big bend?

A. At the mouth of the creek there must be six or seven feet. When you get up into the bend there is not over eight to ten inches.

Q. Mr. Mackey, of what is Tommy Creek the outlet?

A. Fayette Pond and Peach Island Pond.

Q. Does it extend south of Fayette Pond?

A. No, sir.

Q. Has it any connection with the water to the south of Fayette Pond?

A. No, sir.

Q. Mr. Mackey, what is the character of the vegetation in these various ponds, bays, and bayous that you have described?

A. Well, arrow head, deer tongue, pond lilies, cat tail flag, some bulrushes.

Q. Just previous to the filing of this petition, Mr. Mackey, in this case of the Winous Point Shooting Club v. Caspersen, did you see them fishing up there?

A. Yes, sir.

Q. Where were they fishing?

A. On the south side of Mud Creek Bay.

Q. Near what point? Show us on the map. (Witness shows on the map.)

By Col. Bartlett:

Q. Was it above Long Point?

A. Below.

By Mr. Holding:

Q. Near what is known as Blood Point?

A. Yes.

Q. On what side?

A. West side.

Q. What depth of water?

A. When I saw them they were standing out of their boats pretty nearly up to their knees in water. Probably eight to ten inches of water.

Q. What kind of net were they using?

A. Seine.

Q. How did they pull it out?

A. With a windlass.

Q. Where was the windlass?

A. On the banks.

Q. On the solid ground?

A. I do not know that it was on the solid ground.

Q. Was it out of water?

A. I could not say.

Q. Was the bank above water there?

A. It was just back of where they were fishing.

Q. Where this windlass was?

A. I do not remember. Sometimes they have the windlass on the hard bank and sometimes out in six or eight inches of water.

Q. When they wound up the windlass, where were they, if you remember?

A. I think they had their seine wound in when we got to them. I most forget, it has been so long.

Q. Who was with you?

A. George Jones, John Geralds.

Q. John Fitzgeralds?

A. Yes, sir. I do not remember any of the rest of the boys.

Q. You remember Fitzgeralds?

A. Yes, and George Jones.

Q. Do you remember whether Atwood was there?

A. I could not say.

By Judge Haynes:

Q. How long a sweep could they make with the nets?

A. From thirty to forty rods.

Cross Examination by Mr. True.

Q. You were game keeper for the Winous Point Club for a period of ten years?

A. Yes, sir.

Q. At what time did you begin?

A. I think it was in 1888.

Q. The depths of water you were giving here were during the low stage of water in 1894?

A. No. As I have known it from the time I worked there.

Q. The average stage over the entire ten years?

A. Yes, sir.

Q. How much lower was the water, if you know, in 1894, than it was in 1886?

A. Well, it was considerable. It must have been a foot or more.

Q. And it is a fact, is it not, that all over that country the water stood from a foot to eighteen inches lower in 1893, 1894, 1895, and 1896, than it did prior to this?

A. Yes, in 1894 it was the lowest I have known it.

Q. Is it not a fact that it is now a foot higher than in 1894, 1895, and 1896?

A. Yes.

Q. You described a territory in here known as Slade's Pond. You did not know of any such pond did you in your experience there?

A. I knew of Slade's Point and Slade's Pond Channel.

Q. Never heard of any Slade's Pond?

A. I knew there was lots of ponds.

Q. This country all back through in section 14 is full of ponds?

A. Some of it.

Q. Extending back about how far from the water's edge was there marshy land?

A. Well, there is a marshy point runs back here eighty rods. (Shows on map.)

Q. Is not that a part of sections 13, 14, and 16?

A. No, sir.

Q. What is the character of the shore in the south part of sections 14, 15, and 16, low and marshy?

A. Well, it is pasture lands. You cannot go on it with a duck boat, and sometimes you can go on it with shoes on.

Q. At any time in the year?

A. Mostly in the spring.

Q. When the wind is blowing from the northeast and the waters rise it overflows the south part of sections 14, 15, and 16?

A. Yes, at the time they made the survey there was a foot and a half of water where this pasture is.

Q. Ice frozen all over?

A. Yes, back half a mile.

Q. And it was also true in sections 35, 34, and 33, on the south side?

A. Yes, all the high land of Winous Point was all under water and ice.

Q. Is all this country low marshy land?

A. Some of it. Winous Point and other points are two to three feet above water.

Q. How is Long Grass Point? Merely a marshy point protected with riprapping stone?

A. Yes, they can drive on it with teams.

Q. And this is all marshy on the other side?

A. There is a bay on one side and marshy ponds on one side.

Q. When the water is high all Long Grass Point becomes submerged?

A. Yes.

Q. This is also true of all the territory designated as Winous Point territory except a small portion where the club houses are? That is all under water, too?

A. When they made the survey it was all under ice.

Q. It has been prior to that?

A. Right when they made the survey I skated all around there.

Q. The waters had gone down?

A. Yes, they fell some.

Q. In the ordinary stage of water, north of Winous Point, designated as marsh, is under water?

A. Yes.

Q. All of section 22 is marshy land with the exception of the small portion upon which the Winous Point Club is situated?

A. There are woods, and orchards, etc.

Q. How many acres not marshy land?

A. It is hard to tell.

Q. Ten acres?

A. Yes, more than that.

Q. About how many acres?

A. Twenty to thirty.

Q. All the marshy land?

A. Yes.

Q. Have you measured the depths of the water between Long Grass Point and Winous Point?

A. Yes.

Q. The average depth of the water is about five feet?

A. No, sir.

Q. How deep is it?

A. Some places not over a foot and a half.

Q. Other places five feet?

A. Some places probably four.

Q. Have you seen boats sailing all over that territory?

A. I have sailed there myself.

Q. Sailed way back in here?

A. Well, a good share of it, with small sail boats.

Q. This is what is known as Great Goose Pond?

A. Yes.

Q. You found the same vegetation east of Long Grass Point that you did west of it, did you not?

A. The vegetation starts from the shore. It will be deer tongue along the shore, then bulrushes, and after that it comes into wild celery.

Q. And that same condition exists along this side?

A. No.

Q. How is it on this side?

A. It is more celery. I was going to say on this side the water is thick with wild celery, and no deer tongue to speak of.

Q. On the east where there is more grass, more grass to obstruct navigation than on the west side?

A. For a little ways along shore, for probably ten rods out.

Q. Did you ever measure the depth of the water from Winous Point to Bixler's Point?

A. Yes.

Q. What is the average depth of water?

A. I should say about three feet.

Q. Isn't it six?

A. No, sir. At the end of the point there is probably six inches of water; up here is probably a foot and a half. Through this cove probably three feet. As you get up here you strike another island and shallow streak of water. It is shoal up through here. When you get here is Mud Creek Channel. (Witness points out locations on map.)

Q. How deep is it there? (Pointing to map.)

A. Probably five feet of water. When it turns east of this long point the channel turns around here; it is deep all around this point.

Q. There has been a stone pile built out that you call Long Point?

A. Yes, sir.

Q. The water inside is as deep as it is outside?

A. There is land a foot above water inside the stone pile.

Q. How much?

A. There is some land.

Q. A hundred square feet?

A. Probably as big as this room.

Q. They built a long stone pile and built an artificial island?

A. No, they built a little stone pile as big as this room. That did not start from the shore.

Q. It is not long as designated on this map?

Q. Now, Mr. Mackey, what depths of water are there between the point of land south of Squaw Island, west of the point known as Winous Point, what is the depth of water across Mud Creek Bay at that point?

A. It varies from six inches to five feet.

Q. A gradual basin, beginning at the shore at six inches, to five feet at the middle?

A. Pretty nearly.

Q. That is also true all through what is known as Mud Creek Bay?

A. Oh, no. There is islands and points.

Q. Do you know an island called Middle Island?

A. Yes, sir.

Q. It is under water most of the time?

A. Yes.

Q. It is only a little bunch of bulrushes?

A. Not very little, either. Pretty good sized.

Q. Is there some riprapping around that?

A. No.

Q. That is under water most of the time? That is so as to Durbin's Island?

A. No, that was riprapped before the island washed away.

Q. If it had not been for the riprapping it would have washed away?

A. Yes, sir.

Q. The main islands have been riprapped to prevent them from being washed away by the waves of Mud Creek Bay?

A. Yes, sir.

Q. How deep is the water in what is known as Horseshoe Bay?

A. Two and a half to three feet.

Q. You have seen boats sailing over that from time to time?

A. Yes, sir.

Q. Sailing boats, scows, fishing boats, and pound boats tack back and forth?

A. Pound boats do.

Q. And with center board down?

A. Yes, sir.

Q. That has been navigated as long as you have known the grounds?

A. Yes, sir.

Q. I understood you to say there was two feet of water on the Middle Grounds?

A. There is, I should think.

Q. That is the most shallow portion of the bay?

A. Long Point and Middle Island are also.

Q. How much of the Middle Ground is above water at the ordinary stage?

A. I do not think any.

Q. All under water, the Middle Ground?

Q. Is Cape Island under water?

A. No, sir.

Q. Is that riprapped?

A. No, sir.

Q. How large a bog is that?

A. About half an acre I should think.

Q. Nigger Head is another portion of the marsh riprapped?

A. Yes.

Q. How many acres in Eagle Island at the present time?

A. I could not say. Probably an acre and a half or two acres.

Q. Do you know the depths of water from the east end of Eagle Island to South Point?

A. Well, they vary.

Q. About how much? From six inches at the shore to six or seven feet in the middle?

A. About six feet in the middle.

Q. Between the east end of Eagle Island and Slade's Point, what is the average depth of water?

A. Outside the channel would be probably four feet in some places; in some places not over six inches; in the channel about twelve feet.

Q. You have not sailed over all the territory you have just described?

A. Part of it; not all of it.

Q. The greater part of it?

A. I did not sail upon the south side of the river. From the channel of the river to Eagle Island is all a solid mass of vegetation.

Q. The vegetation does not last more than two or three months?

A. They could not sail, I should think, from the first of June to probably the last of March.

Q. There ought to be no grass there the first of November?

A. Never would move grass without ice.

Q. This territory from Tommy Creek on the south to Canvas Back Point on the north, and west to Bixler's Point, is all open water during the entire season of the year except the months of July, August, September, and October?

A. Well, no, not exactly.

Q. How much of it is not open water?

A. It depends a good deal on the seasons. If it would have a freeze up in November it would take the vegetation away and it would be open. If it would not, it would not be open. The ice is the only thing that would move the vegetation.

Q. It stays there, does it not?

A. It stays there, but—well, there is a certain amount of vegetation that the frost does not cut down but what you can see it. It will stand up and make blinds that you can hide in.

Q. That is the vegetation on the Middle Ground and Middle Island?

A. Around the edges of the bay.

Q. All the water in between there is all open?

A. Yes, at certain points and places. I was going to say at points and places where the heavy vegetation does not grow is where it is open water.

Q. And during the months when vegetation is most luxuriant a large portion is open?

A. Yes.

Q. At the times the vegetation is most luxuriant there is only grass upon the Middle Grounds, and around the shores of the bay and bogs you have designated?

A. You take where this—where some of the vegetation grows, it falls over after the frost strikes it, and others it is so thick in the summer time, the wild celery, that you cannot run through it with certain boats.

Q. I will hand you a photograph marked "Exhibit G,"

which shows from the east end of Squaw Island, looking west, and will ask you if that is not a fair representation of that territory when the vegetation is most luxuriant?

A. Yes, I think it is.

Q. From the Middle Ground looking southwest; I will ask if this is not a fair representation when vegetation is most luxuriant; "Exhibit D?"

A. These are looking where, did you say?

Q. This is from the Middle Ground looking southwest, taken from a boat in the main channel of the Sandusky River?

A. That must be away out in here then, if taken from the Middle Ground.

Q. It is taken from a boat in the main channel of the Sandusky River, off Canvasback Point, looking towards the Middle Grounds, southwest?

A. Well, that—this heavy vegetation looks like the Middle Ground. That is about the way the vegetation grows on the Middle Ground. I could not say anything about whether it was a true picture, not knowing.

Q. Now what is known as Bixler's Point, Mr. Mackey, is also a portion of Marsh Land?

A. Yes.

Q. There is no land there of any consequence?

A. You can get out and walk around on it.

Q. With rubber boots?

A. Yes, and with shoes.

Q. How much land?

A. It runs back ten or fifteen rods.

Q. And the rest of the territory is marshy land?

A. Yes.

Q. Covered with water?

A. Not covered with water, but soft boggy land.

Q. When the winds blow from the northeast the waters of Mud Creek Bay rise, do they not?

A. Yes, sir.

Q. And they rise as much as three or four feet, don't they?

A. They rise three feet, I should think.

Q. When the wind is blowing very hard from the southwest they fall about three or four feet?

A. Yes, I have seen it dry.

Q. There is a difference between the highest water and the lowest water of from eight to ten feet?

A. No, I would not say it was that much; it might be six feet.

Q. The current running up from the bay in what is called the channels of the Sandusky River runs both ways; when the wind is east it is up, and when the wind is west it is down?

A. Yes, sir.

Q. In other words, the waters of Mud Creek Bay rise and fall with the waters of Sandusky Bay?

A. Yes, sir.

Q. And the waters of Sandusky Bay rise and fall with the waters of Lake Erie?

A. I suppose.

Q. And the waters of Mud Creek Bay are connected with Sandusky Bay?

A. I could not say.

Q. The waters are all connected?

A. The waters are all one, I suppose.

Q. And Sandusky Bay is connected with Lake Erie, you know that?

A. Yes.

Q. You say when the defendants in this case were fishing there, a short time prior to the allowance of this injunction, they were fishing west of Blood Point?

A. Yes.

Q. They had their seine out in semi-circular shape, and they hauled it toward shore. They cannot operate these seines can they in water less than three or four feet deep?

A. They can haul them in probably two and a half feet of water.

Q. You could not haul them in water that you could not go in with large fishing boats?

A. The waters could be deep enough to float the boat with the seine.

Q. They are put out from the stern of a large lifting boat?

A. Yes.

Q. And at the place where these men were standing, you say they were in water up to their knees?

A. They generally have to haul out in water up to their knees.

Q. You cannot haul out on the beach?

A. You can.

Q. But the fish jump out?

A. Yes, sir.

Q. And they have a boat, and had there, beside it?

A. You do after you get it together and get ready to put the fish into the boat.

Q. They dip the fish right from the seine into the boats?

A. Yes.

Q. That is what these men were doing?

A. Some did. We did not stop to see whether they took the fish out or not.

Q. The boat would float around there?

A. They generally shoved the boat ashore. Of course it would float up to the shore.

Re-examination by Mr. Holding.

Q. Do you know whether they shoved the boat ashore on this occasion?

A. I do not know; could not say.

Q. You say they operated these seines from boats. What kind of boats, what kind of bottoms, and drawing what depth of water?

A. Oh, they had an ordinary flat bottom boat, probably six or seven foot beam, eighteen to twenty foot long, when empty will probably draw two or three inches of water. When loaded with the seine in they will probably draw six of eight inches.

Q. How propelled?

A. By oars.

Q. When Mr. True asked you about boats that sailed over there what kind of boats did you have reference to, drawing what depth of water?

A. Well, there is these same boats I just described.

Q. The same boats with sails on?

A. Yes, sir.

Q. What is the fact as to whether sail boats could get through this dense vegetation?

A. They could not.

Q. You have said, Mr. Mackey, I understand it, that the ice comes there at what time?

A. It varies. Generally along the twentieth of November

Q. At that time vegetation is still standing?

A. Yes, sir.

Q. And it remains frozen until the ice goes out in the spring?

A. Yes, or the ice may go out before spring.

Q. Now, during the time of this vegetation, you may state to the court, whether or not, outside of the channels and certain little places where there is open water, these boats can be sailed during the time of vegetation?

A. Well, during the time of vegetation the only place they can sail is around the small creeks where this heavy vegetation does not grow.

Q. You have stated about boats sailing in Horseshoe Pond. What season did you mean?

A. Along in the spring.

Q. After the ice is gone?

A. Yes, sir.

Q. What size boats have they up there?

A. Some of these same fish boats, duck boats—

Q. Duck boats are propelled by hand are they not?

A. Some of them are.

Q. Drawing what depth of water?

A. Four or five inches.

Q. You have stated to Mr. True that sometimes the waters rise there in the river and in the bay and in the creeks three to four feet, as I understand you?

A. Yes.

Q. Is that an ordinary rise, or is it an extraordinary rise when it is three to four feet?

A. It is extraordinary.

Q. How long has the wind been blowing to do that?

A. Generally two days.

Q. Strong, or otherwise?

A. Strong.

Q. That is, in time of gales?

A. Yes, sir.

Q. And is it not a fact that the waters down there rise sometimes over this section when it is blowing from the other direction, from freshets, etc.?

A. It does some, but not very much.

Q. At the time Mr. DeWitt went out there making the survey for this map, had there been an extraordinary rise in the water?

A. Yes, sir.

Q. Had you ever seen it higher than it was at that time?

A. I do not think I ever did.

Q. How high above the ordinary level was it?

A. I should think between three and four feet.

Q. Do you know where the Winous Point Club ground is, where the house is, of course?

A. Yes, sir.

Q. And how was the water at that point?

A. I was all over the point, all over the land.

Q. Was it on the porch do you know?

A. Yes, and it was in some of the buildings.

Q. How much higher, in your judgment, did the water rise on that occasion than at any other time?

A. I have seen the water as high as that, but I do not know as I ever saw it any higher. It was as high as I ever saw it.

Q. Now you may state, did it freeze in that condition?

A. Yes, sir.

Q. Did you see Mr. DeWitt making measurements at that time?

A. Yes, sir.

Q. What do you say as to whether the water rising in the way that it did upon the occasion that this survey was made, covering more country than it would at the ordinary stage of water?

A. *It will.*

Q. Did it on this occasion?

A. Yes, sir.

Q. I understand you to say that the dry land up there in the pasture ground, in sections 13, 14, and 15, was covered for half a mile back?

A. It was.

Q. Is that usual or unusual?

A. Unusual.

Q. How many times have you seen that condition of affairs?

A. I think only once or twice, but I had saw it before. We own land right here adjoining Winous Point, in section 14. I saw it under water a good many times.

Q. That is, in these extreme blows?

A. Yes, sir.

Q. Speaking of Long Point, you may state to the Court whether or not Long Point is an island or whether it runs out from the shore line?

A. Well, it is a shallow point, but covered with water with the exception of where stone is around it.

Q. Does it run out from the shore line?

A. Yes, sir.

Cross Examination by Mr. True.

Q. Mr. Mackey, did you mean to convey to the court that that survey was made by Mr. DeWitt while the water was high, during the northeaster?

A. It was made while the ice was over the land.

Q. Not while the water was high?

A. The water was high, and the survey was made on the ice.

Q. How long did the water remain high?

A. About three days.

Q. And the survey was made long after?

A. That was made on the ice.

Q. Do you know that they were several weeks making that survey?

A. Yes, sir.

Q. The water had been down several weeks?

A. I suppose it was, when it came to go out.

Q. At the time of that high water every portion was under water?

A. Yes.

Q. Winous Point?

A. Yes, sir.

Q. All this land back here?

A. Yes, sir.

Q. Did the engineer survey around where that ice was, or did he survey the shore line of the marshes?

A. I could not say. We could see them as far back as the section line.

Q. He did not go back into the country where that ice was, did he?

A. He went back in some of it.

Q. Did he survey over this point here?

A. I think he did. I saw him running chains away up in what I call higher ground.

Q. Did you see him when he took the soundings?

A. No, sir.

Q. You know they were not taken at the time the water was high?

A. I do not know. I saw them making the survey on this ice.

Q. After the water had gone down?

A. Yes.

Q. When the water goes down the ice goes down with it?

A. Yes.

Q. You have seen the schooner Red Cloud sailing all over these waters?

A. There was a boat called the Red Cloud.

Q. A schooner is it not?

A. I do not know. Never saw it.

Q. You have seen the schooner Reindeer?

A. I have saw scows running down Mud Creek.

Q. You have seen them tacking across Mud Creek?

A. I do not know that I ever did.

Q. The Winous Point Club members own some sailing yachts?

A. They have small boats there.

Q. How large are they?

A. Probably twenty feet long.

Q. Pleasure yachts with sails on them?

A. Yes, sir.

Q. To carry how many persons?

A. Eight to ten.

Q. You have seen them sailing all over that territory at nearly all seasons of the year?

A. Some of it; not all of it.

Q. Of course they do not sail through these little bogs around the islands?

A. Some times of the year, when the vegetation is not too thick.

Q. At all seasons they can sail through bulrushes?

A. They can—well, when the water is deep enough.

Q. At what season of the year do they use these yachts?

A. July and August.

Q. That is the time vegetation is thickest?

A. It is as thick then as any time.

Q. They also have a little steam yacht?

A. Yes, sir.

Q. Do they run that?

A. Where they can run.

Q. Can they run in these little bunches of grass?

A. The naphtha launches only can run in Sandusky River.

Q. Because the grass gets in the wheel?

A. Yes.

Q. They have a little yacht that goes right through the grass and cuts it?

A. Yes.

Q. Do they run through the Middle Ground?

A. No.

Q. They do not stop for grass or pond lilies?

A. I never saw them run through the Middle Ground. I saw them run through celery.

Q. The wheel is arranged so that it cuts the grass and it does not cling to it like to the ordinary wheel?

A. Yes.

By Mr. Holding:

Q. Mr. Mackey, talking about these pleasures yachts, what is the draft of the biggest pleasure yacht owned by any member of the Winous Point Shooting Club that you know of?

A. Well, I think the naphtha launch.

Q. What will it draw?

A. About eighteen inches; sixteen to eighteen, I think.

Q. Do you know whether or not they had to dredge a channel out from the Winous Point Club House to the main channel for the purpose of getting that launch in and out?

A. Yes.

Q. What will these sail boats, the heaviest draft sail boats they have there, draw?

A. Probably a foot to sixteen inches; something like that.

Q. And this one that cuts the grass, what will it draw?

A. About a foot to fourteen inches.

Q. What do you know as to whether or not that was a little boat constructed for the purpose of cutting grass?

A. Well, I do not know as it was made a purpose to cut the grass.

Q. Would it cut through this celery?

A. When they came in that they would put on knives to cut through. They tried it first and it would not go.

By Mr. True:

Q. The schooner Red Cloud draws about three feet of water, does it not?

A. There is a boat by the name of the Red Cloud; I do not think it draws that much. It does not belong to the members.

Q. It is used there?

A. I do not know; it has not been used for a good while.

Q. How much water does it draw?

A. I could not tell.

Q. Is it a center board boat?

A. Yes.

Q. Fishing boats sail with center boards down?

A. Yes.

Q. Pound fishing boats with center board down draw about three feet of water?

A. Yes, I think they would.

Q. Or four feet, as much as the average scow used to market wood, stone and lumber?

A. I do not know anything about the scows.

Q. You have frequently seen the fishing sail boats come up there and load up with two or three tons of fish and sail down the bay again?

A. Yes.

By Mr. Bartlett:

Q. You have seen these fishing boats sailing with center board down; you have seen them sailing with center board down outside the channel of Mud Creek Bay?

A. They generally have to have the board down to navigate.

Q. They were working in the channel?

A. Yes.

Q. Outside on these flats was there water enough to work the boats with center boards?

A. On the flats they would work the boats in the deep places. They knew how to work up there.

Q. On these flats is there enough water to work boats with center board down?

A. There is flats they could not sail over or work on with center board down, so they sail over in fair wind.

Q. These boats you were speaking of going up Mud Creek, what portion of the waters have they navigated, any portion outside of the channel?

A. No, sir.

Q. Hugging the channel?

A. Yes, sir.

Q. What do you know of the sail boats and scows coming up there and being compelled to come to anchor because of the wind being adverse and they could not work because of it?

A. I have saw that lots of times.

By Mr. True:

Q. They do that in the lake also?

A. I suppose.

Q. You have seen this large boat of Capt. Kelly's sailing all over that territory?

A. I saw his one boat.

Q. Yes, that flat boat?

A. Yes.

Q. Do you know how large it is?

A. No, I do not know anything about her.

Q. Have you seen this large schooner of Mr. Stewart's, a member of the club, which Capt. Kelly is sailing?

A. No, sir, I have never saw her up there. They have bought her since my time.

By Judge Burrows:

Q. I suppose Mud Creek Bay goes from Bixler's Point to Eagle Island. Does this vegetation in July and August cover that entirely?

A. A certain amount it does.

Q. You can go through right in the channel?

A. This thick vegetation known as wild celery grows all over this until you strike the main channel of the Sandusky River. There is no vegetation in there at all.

Q. Does it come up to the surface of the water?

A. Yes, sir.

Q. There really is no portion of the bay above the mouth of the Sandusky River but what has vegetation all over the surface?

A. Yes, sir.

Q. The celery interferes with navigation?

A. Yes, sir. It is as thick as hair on a dog, and spreads out over the water, and it is almost impossible to row through it. It will get on the ends of the oars, and it will almost break the oars down to get them out of the water.

Q. Is there grass in the one channel?

A. There is grass all over Mud Creek Bay.

Q. In the channel there?

A. There is a channel after you get up above or opposite the Middle Ground; a kind of channel; the water is deeper there.

Q. All you know about the channel is that it is deeper in some places than others?

A. That is the way the channel winds.

Q. Can you tell by the current?

A. By seeing it dry. I have seen it dry and the channel would have a foot of water or so, and all the rest dry.

Q. It was deeper than the rest by about a foot or so?

A. Yes.

By Judge Haynes:

Q. There is not much water comes in the creek in dry weather, is there?

A. No, sir.

By Judge Parker:

Q. This channel, the Mud Creek channel, where no vegetation grows, there is a channel with no vegetation, is there not?

A. No, sir.

Q. The vegetation grows right through the channel?

A. Yes, sir.

Q. Does that vegetation come to the surface?

A. Yes, sir.

Q. This part that is deeper, that you call the channel, is about how wide?

A. When you get up to what is known as Long Point it is probably fifteen rods wide.

Q. Then following along down past Winous Point?

A. Well, the channel there kind of widens out when it gets down opposite the club house and you cannot tell that there is much of a channel; it is probably thirty or forty rods wide or more.

Q. At that point can you discover distinctly the channel of the Sandusky River?

A. Yes, sir.

Q. About how wide is it?

A. I should think twenty-five to thirty rods.

Q. From that point out to Sandusky Bay?

A. The channel is about that wide all the way through where there is no vegetation grows at all.

Q. About twenty-five to thirty rods?

A. Yes, sir.

By Mr. True:

Q. This same wild celery that grows in Mud Creek Bay, that comes to the surface, grows in Sandusky Bay?

A. I have seen it in Sandusky Bay, yes, sir.

And thereupon plaintiff to further maintain the issues on its part introduced as witness,

JOHN FITZGERALD,

who, being duly sworn and examined, testified as follows:

Direct Examination by Col. Bartlett.

Q. Are you in the employ of the Winous Point Shooting Club?

A. Yes, sir.

Q. In what capacity?

A. Superintendent.

Q. How long have you been in their employ as superintendent?

A. Nine years.

Q. Whereabouts have you lived during these nine years?

A. At Winous Point.

Q. At the club house?

A. Yes, sir.

Q. How long have you been acquainted with the locality?

A. About nineteen years.

Q. Did you live at the club house prior to the time of your being superintendent?

A. Yes, sir.

Q. For what length of time?

A. Ten years.

Q. Was that during the time your father was superintendent?

A. Yes, sir.

Q. I wish that you would describe to the court the character of the waters, what you know of there being a continuous channel from Fremont out through into the bay.

A. There is a channel; the Sandusky River.

Q. Now when you get down into the locality anywhere between Green Creek, the mouth of Green Creek, and Squaw Island, about what is the average width of the channel?

A. Well, I should say twenty to thirty rods.

Q. What is the average depth of that channel?

A. It will average from—about twelve feet, I should say.

Q. Do you know the location of a bar down in the channel near the east end of Eagle Island?

A. Yes, sir.

Q. Whereabouts is that bar, with reference to a line drawn from the lower end of Eagle Island to Slade's Point?

A. About on that line from the east end of Eagle Island to Slade's Point.

Q. Whereabouts does this channel you speak of lose itself in the larger waters?

A. Just opposite the end of Eagle Island and Slade's Point.

Q. Is there more than one channel from the head of Eagle Island?

A. Yes, sir.

Q. In what direction do they run, and what are they called, these two channels?

A. One is the north channel of the Sandusky River, and the other is the south channel.

Q. In what direction does the south channel run?

A. In a southeasterly direction.

Q. Whereabouts does that channel lose itself in the larger

waters with reference to a line running from the lower end of Eagle Island to South Point, on the south shore?

A. Just a little bit to the southeast of the line of the two points.

Q. That would be beyond?

A. Beyond, yes, sir.

Q. Now, take Mud Creek and Mud Creek Bay, whereabouts do the waters of Mud Creek or Mud Creek Bay intersect, if at all, this river channel which you speak of?

A. Between Winous Point and Squaw Island Point.

Q. What is the relative depth of the two at that point?

A. I should say over four feet. You mean from Winous Point to Squaw Island?

Q. What I mean is where Mud Creek empties into the river, taking the channel of the creek and the channel of the river, what is the comparative depth of the two?

A. Mud Creek is about three and a half to four feet, and the river is about twelve.

Q. And you take the channel back at that point, how is it as to being nearly vertical or perpendicular?

A. It is perpendicular or very nearly.

Q. What is the fact as to that being the general character of the channel of the river, the navigable channel?

A. It is.

Q. What is the fact with reference to the land from the bank to the navigable channel, under the water, sloping gradually to the shore line?

A. Yes, sir.

Q. Now, take the Middle Ground and opposite there, about what is the depth of water there upon the channel bank of the river?

A. About two feet, I should say.

Q. Now, running from that point to the shore line, does that depth decrease, become shoaler?

A. Yes, it does. There is one place that it gets a little deeper, and it gets shallower.

Q. I am speaking of the Middle Ground part?

A. Yes, sir.

Q. And at the shore line about what is the depth of the water on this Middle Ground?

A. Oh, a foot and a half to two feet.

Q. I mean right at the shore line; at the main land?

A. That is a couple of inches there.

Q. And then grows deeper from that out to about three feet, did you say, at the river bank?

A. About two feet to two and a half.

Q. What would you say was the average depth of water upon the Middle Ground?

A. About two to two and a half feet.

Q. Take the shore line with the deepest, and throwing it all together, how much would it average?

A. About two to two and a half feet.

Q. Now what is the fact as to a channel existing through Mud Creek Bay and running on up west, or in the creek?

A. Well, there is a sort of a channel there; not much of a channel to it.

Q. I wish you would give the points of the channel, starting say from a point at the club house, or opposite and going up Mud Creek. In what direction would you first go, following the deepest water?

A. You would take about a westerly course up to the Middle Ground, then change and run a northwesterly course around Long Point, and then turn to the southwest again.

Q. After you turn to the southwest would you head again to the west?

A. Yes, sir.

Q. Would that bring you to Bixler's Point?

A. It would take you by Bixler's Point.

Q. Now is there a point running from the south shore of Mud Creek north, on the east of Bixler's Point?

A. Yes, sir.

Q. What is the name of that point?

A. Long Point.

Q. Does that point, or did it when you first had knowledge of it, connect with the main land?

A. Yes, sir.

Q. What do you know of the club having to protect that point by riprapping?

A. They have.

Q. Do you know about how many years ago that was?

A. It has been about twelve to fifteen years, or eighteen years, something like that.

Q. So that there is some portion of the land of that point still left out near the end of the point?

A. Yes, sir. At the end of the point.

Q. How much further north is the northerly point of Long Point than the southerly point of Bixler's Point?

A. Oh, it would be a few rods. Six or eight rods, I would say.

Q. What I mean is this: Draw a line due east and west that would intersect the point of Bixler's Point, how far north would Long Point reach beyond that line?

A. Well, eight or ten rods, I should say.

Q. And in following the channel of the creek you have to double that point?

A. Yes, sir.

Q. Is Bixler's Point an island or part of the main land?

A. Well, it is—the last few years it is part of the main land.

Q. No water surrounding it?

A. No, sir.

Q. Is Winous Point an island or main land?

A. Well, I would call it main land. There is a swale.

Q. Is there any water at the usual stage surrounding it?

A. If it is high water.

Q. In the ordinary stage?

A. No, sir.

Q. In the high stand of water much of this country is under water that is not at the ordinary stage?

A. Yes, sir.

Q. That is owing to the flat condition of the country, the water spreading far with a slight rise?

A. Yes, sir.

Q. Now, what is the character of the vegetation in Mud Creek?

A. There is wild celery, bulrushes, lily pads, rice, some arrow head, some deer tongue.

Q. What is the fact as to there being a current carrying the waters through Mud Creek out into the river at times when they are unaffected by the winds?

A. There is.

Q. Carrying the water from above there?

A. Yes, sir.

Q. What is the fact in that particular as to Sandusky River?

A. There is a tide in Sandusky River just the same.

Q. I am speaking of a current?

A. Well, a current.

Q. When the waters are unaffected by the winds is there a current?

A. Yes, sir.

Q. And to what extent does that current reach at such times with reference to a line running from the lower end of Eagle Island to Slade's Point?

A. It runs east.

Q. Does the current extend still further east?

A. Yes, sir.

Q. What is the character of the vegetation on these flats on each side of the Sandusky River, say below South Creek?

A. There is wild celery, bulrushes, some deer tongue, lily pads.

Q. You may state what the fact is as to there being a growth that is commonly called a moss or mossy growth upon the bed of these flats, extending some distance up into the water above the ground?

A. Yes, sir.

Q. And this moss you were speaking of, how high will that grow from the ground up through the water?

A. I should say probably two feet.

Q. And is that supported by the water in its growth?

A. Yes, I think it is.

Q. It does not lay flat on the ground under water?

A. No, sir.

Q. Do you know a little bit of land upon the Middle Ground called Cape Island?

A. Yes, sir.

Q. Is there any channel between Cape Island and Peach Island?

A. There is a strip of water there; no channel to it.

Q. Is that water deeper than any other water upon the Middle Ground?

A. No, sir, not as deep.

Q. What is the fact as to that channel being filled with vegetation in the season of vegetation?

A. Yes, sir, it is.

Q. I will say from June until the going out of the ice next spring?

A. Yes, sir.

Q. What is the character of that vegetation in that particular channel?

A. It is principally lily pads and adder tongue.

Q. And about what elevation above the surface of the water do the lily pads grow?

A. From two to three feet.

Q. And how densely?

A. Very thick.

Q. About what would be the diameter of the leaf of the lily pad, the average diameter?

A. Well, about fourteen inches would be the average, I should say.

Q. What do you say as to that channel being navigable by boats during the season of vegetation?

A. It is not navigable.

Q. Now, what is the general character as to the growth of this aquatic vegetation outside of the channel of the river?

A. Why, it is deer tongue and lily pads.

Q. I know you have spoken of that. I want to know if it is thin or dense?

A. Along the bank of the river?

Q. Along the bank and running back, wherever it may be?

A. There is a heavy growth of it; more in some places than other places.

Q. Taking the whole westerly end of the Middle Ground and running down east for quite a considerable distance, what would you say as to this vegetation being so dense in that locality as to prevent the passage of boats?

A. Well, it is, to a certain extent.

Q. Are there any channels leading through it?

A. No, sir.

Q. It is in general a continuous growth of this vegetation?

A. Yes, sir.

Q. Now, in Mud Creek Bay, what is the vegetation that grows out in the bed of the water there?

A. Why, it is wild celery, teal moss or teal grass, bulrushes.

Q. What effect does that have upon navigation?

A. Well, that obstructs navigation some,

Q. You know these pound boats, the character of them, that are used by fishermen up in that locality?

A. Yes, sir.

Q. Are they flat bottom boats?

A. Some are, and some are round bottom.

Q. Do they carry center-boards?

A. Yes, sir.

Q. Are any of them capable of sailing on the wind, without using a center-board?

A. No, sir.

Q. Can they sail over these flats, on the wind, without the use of a center-board?

A. No, sir.

Q. Can they sail over these flats with the use of a center-board?

A. Well, it depends upon how much water the boat draws. If they have a pound boat that draws six inches of water they could use a foot of board and work there. They might use more by shoving the center-board down and letting it run through the mud.

Q. What effect would that have on the motion of the boat?

A. They would sail if they had a good breeze.

Q. In tacking, beating against the wind?

A. Yes, sir.

Q. With the center-board dragging in the mud?

A. Some distance; not very much.

Q. Could they do that with the vegetation that grows upon it?

A. I am only speaking of the depth of the water on that portion where the vegetation is least. I am speaking of the water and vegetation together.

Q. Can they sail through this denser vegetation that lies at the head of the Middle Ground?

A. Some parts of it.

Q. More to the north of the channel?

A. South of the channel of the river, on the Middle Grounds.

Q. It would be nearer to the channel than it would be to the shore?

A. Yes, sir.

Q. There is a little better water than nearer to the shore?

A. Yes, sir.

Q. Is there any routes of communication, or direct communication between any points where commerce can be con-

ducted in this territory, aside from the navigable channel of the river and the channel of Mud Creek?

A. No, sir.

Q. How long has it been since you have seen Mud Creek used by scows carrying freights either way?

A. I think about ten years ago.

Q. What was the character of the scows or vessels that were engaged in the trade that formerly existed on the waters of Mud Creek?

A. There were scows that hauled cord wood.

Q. And about what length scows did they use?

A. Oh, I should think they would be about sixty feet long.

Q. And about what beam?

A. About sixteen or eighteen feet beam.

Q. About what would be their draft to the water line?

A. A foot to ten inches.

Q. They were all provided either with center-boards or with—what do you call this board alongside?

A. Lee board?

Q. Lee board.

A. Yes, sir.

Q. And what do you say then as to these vessels being unable to navigate these channels or waters of Mud Creek on the wind or against the wind?

A. They could not work up against a heavy wind.

Q. What do you know, when they have encountered such winds, of being compelled to anchor and await days waiting for favorable winds?

A. Yes, sir, I have seen that.

Q. There was another class of boats navigated these waters at one time, steam barges?

A. Yes, sir.

Q. Carrying stone? How long since you have seen any of these navigating the waters of Mud Creek?

A. I think about twelve years ago.

Q. There is no freight or commerce up in that direction that calls for any boats nowadays?

A. No, sir.

Q. And not for many years?

A. No, sir.

Q. The freight, I understood was cord wood?

A. Cord wood.

Q. Some stone was carried up?

A. Yes, some stone.

Q. Do you remember the time when a man by the name of Barringer had a saw mill up there?

A. Yes, sir.

Q. There was some lumber shipped out?

A. I never saw any lumber shipped out.

Q. None within your recollection?

A. No, sir.

Q. Now, the vessels or boats passing up towards Fremont, what waters do they use?

A. Sandusky River.

Q. What portion? The channel, the navigable channel?

A. The channel of the Sandusky River.

Q. What is the fact as to the channel of the Sandusky River being marked by the growth of vegetation upon the bank of the channel?

A. It is marked with vegetation.

Q. And very distinguishably so?

A. Yes, sir.

Q. So that a person navigating a boat could see it, the channel, and designate it from the surrounding waters for what distance?

A. Oh, for quite a distance.

Q. As far as the stretch or reach of any portion of the river?

A. Yes, I should say he could.

Q. The river is crooked?

A. Yes, sir.

Q. What is the fact as to the channel or the waters being narrower between the west end of Eagle Island, which is locally known as Nigger Head, to Canvas Back Point, than they are further west?

A. They are considerably narrower.

Q. What is the fact as to the north channel hugging close to Eagle Island and rounding it?

A. It does.

Q. And between the land of Eagle Island and that channel, what is the character of the growth there?

A. That is bulrushes and cane; some deer tongue.

Q. Is it slight or dense?

A. Pretty dense.

Q. As much so as in any place down there?

A. Yes.

Q. That is among the densest of the vegetation?

A. I should say it was.

Q. Have you noticed any difference in the size of Eagle Island from what it was when you first knew it?

A. Yes, it has washed away considerably.

Q. What do you know of this vegetation that is around about Eagle Island being on that portion or growing on that portion that was originally land?

A. Well, it does.

Q. Now, in the waters of the bay below Eagle Island, or about how far around Eagle Island does this vegetation grow?

A. On the north side of Eagle Island it grows out to the river bank, about sixty or eighty rods, or ninety rods; bulrushes grow east of the island, out in the bay; I should say they were out there for eighty rods or more maybe east of the island; on the south side they do not grow out very far, a few rods.

Q. Below where these rushes grow in the bay is the vegetation wild celery principally?

A. Yes, sir.

Q. Was you present, or what knowledge have you of this man Caspersen and some others that have been mentioned, fishing upon these waters?

A. I saw them fishing there.

Q. Whereabouts was it that they fished when you saw them, and when was it?

A. They were fishing on the south side of Mud Creek Bay, east of Long Point. I do not remember what year.

Q. What time of the year? .....

A. I think it was in the spring of the year.

Q. Can you tell whether it was before or after the action was brought?

A. I think it was before.

Q. These actions were the result of that partly?

A. Yes, sir.

Q. Is it in the cove on the south shore that they were fishing?

A. Yes, sir.

Q. In the cove part?

A. Yes, sir.

Q. About what is the depth of the water there?

A. The water is about from four feet to nothing where they were fishing.

Q. Four feet out how far?

A. Out sixty or eighty rods.

Q. And then running in to nothing at the shore line?

A. Yes, sir.

Q. They were fishing with a drag net?

A. With a seine.

Q. About what length of seine?

A. I think it was about thirty-eight or forty rods.

Q. Using capstans for hauling it in?

A. Yes, sir.

Q. And using the boat for paying out the seine?

A. Yes, sir.

Q. A flat bottom boat?

A. Yes, sir.

Q. With a platform across the stern for the accommodation of the twine?

A. No, it was laid right down in the bottom of the boat.

Q. And it was paid out over the side of the boat?

A. No, over the stern of the boat.

Q. The boat had a square stern?

A. Yes, sir.

Q. Was there a man rowing at the time or poling?

A. Rowing; they rowed the boat.

Q. They would bring that other end in near land and pull the two ends in in that way?

A. Yes, sir.

Q. What do you know of their placing their capstans upon the land for the purpose of dragging the seine out?

A. They would sometimes put it on the hard ground and sometimes in the edge of the water.

Q. At this particular time?

A. I think that their capstan was on the dry ground.

Q. Were the men engaged in fishing upon the dry ground?

A. No, they were out in the water.

Q. At any time?

A. They had the seine hauled in when we saw them.

Q. Was it still in the water?

A. It was in the water yet; they had it pulled together.

Q. They were about the seine in the water when you saw them?

A. Yes, sir.

Q. These seines are not dragged clear out on the land?

A. No.

Q. They leave the seine in the water, so that they can pull the seine under the fish?

A. Yes, sir.

Q. Mr. Geralds, what do you know of the northeasterly point of Squaw Island extending further to the north and northeast, extending out further than formerly?

A. Yes, it did.

Q. What do you know of there being a line of riprapping stone running out there?

A. Yes, there is riprapping there.

Q. About what distance from the present point of Squaw Island does that stone extend?

A. Well, it is about forty or fifty rods from the land.

Q. Within your recollection was there any land there that that stone was put against for the purpose of protecting?

A. Yes, sir.

Q. But it is now, at an ordinary stage of water, not above water?

A. No, sir, it is under water.

Q. And the stone remaining?

A. Yes, sir.

Q. Mr. Geralds, have you examined this photograph?

A. Yes, sir, some.

Q. And do you know what it is a photograph of?

A. It is a photograph of the Winous Point club's marsh.

Q. Is it of a map that was made of the grounds?

A. Yes, sir.

Q. Now you may state, if you are able to do so, whether or no that is a true or was a true representation of this territory at the survey and map was made?

A. Yes, sir.

Q. You have examined it sufficiently so that you can tell?

A. Yes, sir.

Q. Are these points and ponds, and the character of the vegetation correctly delineated upon these photographs?

A. Yes, sir.

Q. And the remarks and explanations are true, the explanations of the character of the vegetation in the localities designated on the map?

A. Yes, sir.

Q. You may state what the fact is as to the location, and direction and character of both the channel of Mud Creek and also the channel of the river being correctly delineated upon that map?

A. Yes, sir.

Q. And they are correct, the bearings, the different points, the turns and angles?

A. Yes, sir.

Q. Do you know a locality that is locally known as Nolan's Bayou?

A. Yes.

Q. Whereabouts is that located, Mr. Fitzgerald?

A. It is up in the west end of Bunker Hill. I do not know as that name— They have changed these names.

Q. You know the body of water we speak of as Nolan's Bayou or Bolton's Bayou? Do you know it by any other name, or do you know it in fact?

A. I do not know it by that name.

Q. Do you know a bayou in back of Horseshoe?

A. Yes.

Q. At an ordinary stage of water, what is the depth of water in these bayous?

A. Well, it is two and a half feet in the center, and runs out to nothing at the shores.

Q. Are they little basins?

A. Yes, sir.

Q. And are basins to that extent that they will retain the water when the water runs out and leaves outside?

A. Yes, sir.

Q. They are ponds?

A. Ponds, yes, sir.

Q. Is there any vegetation growing in them?

A. Yes, there is some.

Q. And about them?

A. Yes, sir.

Q. And of the same character that you have already spoken of as the vegetation upon the flats there adjoining?

A. Yes, sir.

Q. Now, I want to call your attention also to that terri-

tory that lies in between Horseshoe and the main land on the west, as to the character of the vegetation growing in there?

A. Well, it is lily pads, deer tongue, and flag.

Q. You may state whether it is dense or light?

A. Pretty dense in there.

Q. Can boats be sailed through there in this vegetation, with that vegetation existing?

A. No, I do not think they could.

Q. It is very difficult even to punt through with a small duck boat at times?

A. Yes, sir.

Q. And how is that same condition, what is the fact as to that being the condition of things north of Horseshoe and also northeast of Horseshoe, and between the northerly part of Horseshoe and Bixler?

A. Well, there is considerable bulrushes grows there, a heavy growth of them on the east end of Horseshoe Island.

Q. You take the passage between Horseshoe and Bixler, what is the fact as to that being the outlet of the marshes north and their connection with Mud Creek proper?

A. Yes, that is the outlet.

Q. And persons going in with boats must come out the same way?

A. Yes, they generally come out the same way.

Q. They cannot go around and come out any other localities, can they?

A. Well, there is a ditch cut through from Mud Creek Bay to Bunker Hill. They can come out that way.

Q. You could, speaking of small duck boats?

A. Yes, sir.

Q. That would be done by poling?

A. Yes, sir.

Q. I am speaking of any boat sufficiently large to convey merchandise?

A. They would have to come out the same channel they went in.

Q. What is the fact as to Bixler's Point being a part of the main land or connected with the main land?

A. It is part of the main land.

Q. It is not an island?

A. Not an island, no, sir.

Q. Did I call your attention as to whether Winous Point was an island or not?

A. Yes, I think you did.

By Judge Parker:

Q. You said that was part of the main land, Winous Point?

A. Yes, sir.

By Col. Bartlett:

Q. Mr. Fitzgerald, what is the fact as to the Winous Point club being in possession of these lands, and claiming the ownership thereof, and improving and protecting——

Defendant objects to first part of question.

Objection overruled. Exception.

Q. What acts looking to ownership have the Winous Point club exercised within your knowledge, with reference to these lands?

A. They have protected them and have had them in their possession.

Objection by defendant.

Q. What do you know as to in what manner they have protected them?

A. By riprapping the shores, and keeping trespassers off.

Q. For the purpose of ascertaining to some extent the portions they have done this, what do you know of their having riprapped Horseshoe?

A. No, the Ottawa Club riprapped that.

Q. Well, Bixler's Point?

A. That is riprapped by the Ottawa Club.

Q. The extreme point?

A. Yes, sir.

Q. Running down on the east shore, in Durbin Bay, in Durbin Bay, yes, it is Durbin Bay, what is the fact as to the Winous Point club having riprapped the whole shore line?

A. Yes, sir, they have.

Q. And for what distance, would you say?

A. A mile or more.

Q. And is there no riprapping or stone placed in there at Middle Island?

A. No, sir.

Q. What is the fact in reference to Long Point?

A. That is riprapped.

Q. Taking the point above Squaw Island, between the river and Mud Creek?

A. That is riprapped.

Q. Both on the river side and on Mud Creek side?

A. Yes, sir.

Q. What is the fact as to Squaw Island being riprapped?

A. That is partly riprapped.

Q. That is, looking to the north end of it?

A. It is on the west end where they put some stone.

Q. That is on the bay side?

A. Yes, sir.

Q. On the northeasterly end, running over towards Winous Point?

A. Yes, that is riprapped.

Q. What is the fact as to Winous Point, from the club house down to the point?

A. Yes, that is riprapped.

Q. And down Canvas Back Point it is riprapped, too?

A. Yes, sir.

Q. And running down not far along the shore on the east side to Canvas Back Point?

A. It runs down from Canvas Back Point about eighty or one hundred rods; I should say that.

Q. Is there any portion of Eagle Island riprapped?

A. The west end; what is called Nigger Head.

Q. And how far does it extend around on each side?

A. Clear around it. Clear around the point.

Q. What do you know of their having riprapped the shore line from Tommy Creek up, running west to the south shore line?

A. Yes, they have.

Q. About what distance there?

A. About sixty or eighty rods.

Q. And on at Peach Island?

A. Yes, sir.

Q. What portion of Peach Island?

A. All the west end of it.

Q. Are there any other points now that you remember that they have riprapped?

A. Yes, just across the river from Peach Island there is a point riprapped; the east end of Eagle Island.

Q. Has Cape Island ever had any riprapping?

A. No, sir.

Q. No other point you remember of?

A. Well, they put some at Mud Hole Point; some stone.

Q. Whereabouts is that?

A. Just west of Eagle Island.

Q. Up in the cove on the Mud Creek side?

A. Yes, sir.

Q. Mr. Geralds, you are acquainted with Tommy Creek?

A. Yes, sir.

Q Is there any connection with the waters of Tommy Creek and the waters to the south of Graveyard Island?

A. No, sir.

Q. Is there any waters separating entirely, so as to make an island of what is known as Peach Island?

A. No, sir.

Q. Can you walk from Peach Island on dry land, I do not mean absolutely dry land, but as we understand land to be dry, across to the mouth of Raccoon Creek?

A. Yes, sir.

Q. Are there two ponds lying near Graveyard Island, one called Island Pond, and the other Fayette Pond?

A. Yes, sir.

Q. Island Pond lies on the west side of Tommy Creek?

A. Yes, sir.

Q. And the Fayette on the east side?

A. Yes, sir.

Q. Is Tommy Creek the outlet of these two ponds?

A. Yes, sir.

Defendant objects.

Q. Have these ponds any outlet aside from Tommy Creek?

A. No, sir.

Q. What is the fact as to these ponds being entirely surrounded by land excepting the outlet, Tommy Creek?

Defendant objects.

Objection overruled. Exception.

A. Yes, sir. It is.

(Adjourned until 1:30 P. M.)

Cross Examination by Mr. True.

Q. Just before adjourning you stated that Bixler's Point, the south part of Horseshoe Island, a portion of the shore on the west side of Durbin Bay, Winous Point, Canvas Back Point, a portion of Eagle Island, a portion of the shore west of Tommy Creek and also east of Tommy Creek, and a point west of Squaw Island were all riprapped with stone?

A. Yes, sir. Did you say east of Tommy Creek? I did not say there was any east of Tommy Creek; just west of Tommy Creek.

Q. And also a point west of Peach Island?

A. Yes.

Q. Now this riprapping was placed there to prevent the wearing away of this marsh land by the action of the waves of the adjacent waters?

A. It was put there to keep the land from wearing away.

Q. By the action of the waves of the adjacent waters?

A. To keep the sea from washing it away.

Q. At what seasons of the year was there the greater sea upon the waters of what is known as Mud Creek Bay?

A. Well, in the spring of the year and fall of the year.

Q. And also during the winter season if it is not covered with ice?

A. Yes, sir.

Q. So all of the year, then, except during the latter part of the summer and early fall, that entire territory is subject to seas, waves?

A. There is some sea on there.

Q. These waves will not exist in a marsh will they?

A. Yes, sir.

Q. Will they?

A. Yes, sir.

Q. Where the grass is thick?

A. In ponds.

Q. Open water?

A. Yes, sir.

Q. These waves will not exist, to wash a shore line, in a marsh where rushes, deer tongue, and lilies grow up so that you cannot come through with a boat?

A. No.

Q. You stated this morning that about ten years ago you saw a great many scows and some barges going up and down Mud Creek Bay up into Muddy Creek, hauling wood and stone.

Plaintiff objects.

Q. How many?

A. I saw one scow and one sail boat.

Q. You saw her often then?

A. Not so very often before that, but that was the last time I saw her.

Q. What steam boats were running up at that time?

A. Carrying stone?

Q. Yes.

A. The Dessault, I believe.

Q. A propeller?

A. Yes, sir.

Q. Round bottom?

A. No, sir, flat bottom.

Q. Do you know how many feet of water she draws?

A. No, I do not.

Q. Five or six feet?

A. No, I do not think she would draw that much.

Q. She is the same Dessault that is now a sand sucker operating between Port Clinton and Oak Harbor. You have seen her?

A. No, sir.

Q. She is quite a large vessel?

A. Not so very large.

Q. The same conditions exist there now to navigate vessels?

A. Well, to a certain extent?

Q. If there was a saw mill upon Muddy Creek they could still haul lumber?

A. I never saw them boat any lumber out.

Q. I understood you to say that there was a saw mill up there ten or twelve years ago.

A. There is still, I believe.

Q. Did you ever see any lumber hauled out?

A. No; no lumber; wood, cord wood.

Q. These fishing smacks or pound boats have center-boards?

A. Yes, sir.

Q. They can sail over almost all of that territory with their center-board partly down?

A. Not all over it.

Q. Not on the islands?

A. Nor in the open water.

Q. Is there any place between Bixler's Point on the west, Winous Point on the east, Squaw Island on the east and south, through which they could not sail with these boats with center-board partly down?

A. They can sail around there, but not all over the waters.

Q. Is there any particular territory from Bixler's Point to Winous Point, and from Winous Point to Long Grass Point, and from Long Grass Point down to the end of Eagle Island, and from Eagle Island to South Point, and from South Point to Cape Island, and from Cape Island to Squaw Island, and from Squaw Island to the point west of Squaw Island, and from that point to Bixler's Point, over which these boats could not sail with their center boards partly down?

A. Yes, sir.

Q. Where?

A. Across Long Point, east of Bixler's.

Q. Across the stone pile?

A. Nor where there is not any stone. They cannot sail across the point from the north end to the shore.

Q. Is there any other place?

A. Yes.

Q. Where?

A. Middle Island.

Q. There are parts or seasons of the year they can sail right over Middle Island?

A. No, sir.

Q. Is there not three and a half feet of water on there part of the year?

A. No, sir.

Q. How much water is there?

A. All the way from—well, from six to fourteen inches.

Q. Then a boat drawing eight inches of water could sail over it any part of the year?

A. Well, they could if the wind was northeast and the water high.

Q. They could if the water was low?

A. No, sir.

Q. Cannot a boat drawing three inches of water sail over an island covered with six inches of water?

A. Yes.

Q. Now, Mr. Gerald, you have sailed a boat around this territory a great deal yourself?

A. Yes, sir.

Q. You have tacked up and down Mud Creek Bay a number of times against the wind?

A. Yes.

Q. Is it not a fact that you can sail within a few rods of the south shore all along there?

A. It depends upon what kind of a boat you have and how much water it draws.

Q. Two or three feet?

A. You could sail within forty or fifty rods of shore.

Q. You could sail where these defendants were hauling their seine, could you not?

A. You might with a light draft boat.

Q. Now, then, the only places, in all that territory that I described, there are only two places, one the stony point, Long Point, that you cannot sail over the point, and the other, Middle Island, where the water is six to fourteen inches deep. That is all you cannot sail over?

A. No, there is a flat just above the club house.

Q. You cannot sail over the point?

A. I did not say the point; out from the point.

Q. Does the water deepen suddenly?

A. No, sir.

Q. How suddenly?

A. From the flat fifty or sixty rods out.

Q. West of Winous Point?

A. West of the house.

Q. How much water on that point?

A. Maybe eight inches at the point.

Q. A boat drawing anything less can sail right up to the point and touch the shore?

A. Yes.

Q. This vegetation that you were speaking about comes up here about the latter part of July, does it not, usually?

A. It starts, some of it, in May, generally.

Q. There is not much above the surface until July?

A. In June it is above the surface.

Q. What kind grows above the surface in June?

A. Oh, there is lily pads.

Q. That is beyond the fishing season. The fishing season closes the 15th of June, does it not?

A. I think they fish for carp any time of the year.

Q. This is a great place for carp?

A. Yes, sir.

Q. They are more numerous in Mud Creek Bay than any place you know of?

A. I think they are.

Q. As a matter of fact, they are a great detriment to that territory?

Plaintiff objects.

Q. Now, Mr. Gerald, you fish there, don't you?

A. Yes, some

Q. And the Club permits all their game keepers to fish?

Plaintiff objects.

By Judge Haynes:

Q. What do you fish with? How do you fish?

A. With a seine.

By Mr. True:

Q. The defendants in this case were fishing with a seine?

A. Yes.

Q. Did you ever see the defendants there before this time that you mentioned this morning?

A. No, sir, I never saw them there before.

Q. And you never saw them there since?

A. No, sir.

Q. Never saw them but once, to your knowledge?

A. That is all I ever saw them.

Q. I understood you to say that there was two feet of water upon the Middle Ground?

A. Yes, sir, about two feet of water.

Q. There is a channel between Cape Island and Peach Island, isn't there?

A. No, sir.

Q. What is known as Cape Island channel?

A. I never heard of any Cape Island channel.

Q. How much water is there between Cape Island and Peach Island?

A. Well, there is all the way from—it will run from ten inches to a foot, to nothing; from a foot to nothing.

Q. The grass goes down in there in the spring? There is no grass in there in the spring between Cape Island and Peach Island?

A. The ice pulls the grass out of there.

Q. In the spring you can go through it with a boat?

A. Not very often.

Q. You can if there is ten inches of water?

A. There is not ten inches all the time.

Q. At ordinary times?

A. About ten inches.

Q. Do you remember the instance when I was over there with a delegation from the Legislature, in the spring of 1898?

A. Yes, sir.

Q. You remember we were all on Capt Kelly's boat?

A. Yes.

Q. How large a boat was that?

A. About forty-five or fifty feet long and about fourteen to sixteen feet beam, I should say.

Q. You saw the boat come up there the night before and sail up and down Mud Bay?

A. Yes, sir.

Q. Do you remember which way the wind was when we came up there that day?

A. Southwest, if I am not mistaken.

Q. Was it not northeast? Didn't they come up with a fair wind and tack back?

A. The day you were shooting?

Q. No, the day before?

A. I do not think I saw it the day before.

Q. On that day, Mr. Gerald, that was all open water in here between Cape Island and Peach Island?

A. Yes, sir.

Q. What time of the year was it? Give the month.

A. I think it was in April.

Q. All of the territory lying north of a line drawn from

Winous Point to Canvas Back Point, extending back in to Goose Pond, was all open water.

A. No, sir.

Q. How far back does it go?

A. It is open water to the land there.

Q. Goose Pond is back of the shore line?

A. Yes, sir.

Q. Up to the shore line it was all open water?

A. Yes, sir.

Q. No grass except around the shore?

A. Yes, sir.

Q. That same condition existed around Winous Point, did it not?

A. Yes.

Q. Durbin's Bay was all open. There was no grass in it?

A. No.

Q. All the way around Bixler's Point the same condition existed?

A. Yes.

Q. Clear up to the shore line on the south side?

A. Yes.

Q. And with that boat, at that season of the year, we could sail over any portion of that territory I have just described?

A. I do not think you could.

Q. Except the stony point you just told about, and Middle Island?

A. No, you could not sail over much on the north side of the river.

Q. You mean up in here?

A. Yes, sir.

Q. Between Long Grass Point and Winous Point?

A. At least you did not sail there.

Q. You do not know that we sailed all over there the day before?

A. No, sir, I did not see you. You were shooting just east of the channel bank; then you moved the boat up into the river, as you were afraid you would get the boat aground. The wind was southwest.

Q. Was not it a fact that the water was about three feet lower that day than the day before?

A. I do not know. I was not there the day before.

Q. Mr. Geralds, you stated that you had seen the original drawing, of which this is a photograph?

A. Yes, sir.

Q. And that this is a fair representation of that drawing?

A. Yes, sir.

Q. I understood you to say that Tommy Creek did not connect by water right through into the south marsh here?

A. Yes, sir.

Q. Does not this map show that it does? Look at it. Is not there continuous open water right through there?

A. There is no open water through there.

Q. This map shows it.

A. There is a ditch through there.

Q. How wide is it?

A. There is a low swale there probably about ten or fifteen feet wide.

Q. A natural ditch?

A. No; an artificial ditch.

Q. In Tommy Creek?

A. Between Peach Island and Graveyard.

Q. About how large is the ditch?

A. The ditch has filled up.

Q. Then the map is not correct?

A. It was true at that time. Of course there was a ditch there.

Q. Where was the ditch?

A. Between Peach Island and Graveyard Island.

Q. Does not the water continue right around east of Graveyard Island and connect with Raccoon Creek?

A. No, sir.

Q. Then this map is incorrect, isn't it?

A. It does not show that it does. It cannot run through from north of Graveyard to Raccoon Creek.

Q. You testified this morning that you could walk from Peach Island right across, and cross over Tommy Creek to the main land.

A. I said I could walk from Peach Island to Graveyard.

Q. Did you not say it was dry and high there?

A. No, sir.

Q. Then that is all separated by water?

A. What is?

Q. All this territory east of Tommy Creek is separated by water from Peach Island and Graveyard?

A. That is open water north of Peach Island and Graveyard.

Q. You cannot wade across?

A. I can walk across from Peach to Graveyard.

Q. You can go from Peach Island to Graveyard?

A. Yes, and you can go from Graveyard to the mouth of Coon Creek.

Q. How do you get across that ditch?

A. It was only about a foot deep, and now there is no ditch there.

Q. Then that map is incorrect showing a continuous chain of water through there?

A. No, sir; that was there when the map was made.

Q. It was there when we were enjoined. Do you know when this map was made?

A. I do not remember just when it was made.

Q. How do you know that it was there when the map was made?

A. I know it was there. The ditch was made about twelve years ago I think.

Q. Now, Mr. Geralds, you said that there was a channel coming down Muddy Creek, past Bixler's Point, and around what is known as Long Grass Point or Stony Point, and extending on down through Mud Creek Bay?

A. Yes, sir.

Q. Will you show the court on the map where the channel is?

A. (Witness shows on map.) Well, it comes right in here. It starts in here, and goes down here. This is Horseshoe Island. It comes right by here; this is Bixler's Point. It runs here; then it runs out here, in this direction. Here is where Long Point comes out. It goes out through and around here, around Middle Island, comes in here, then runs down to Winous Point.

Q. How much deeper is the water in this so-called channel than the water upon the edge of it?

A. Oh, up there by Horseshoe Island the water is—south of Horseshoe Island the water in Mud Creek is about four to four and a half feet deep.

Q. And then all that has an average depth down through there of about five or six feet?

A. From four to five feet right on down.

Q. And from the point that you call a channel, extending north, the water shoals gradually until it comes to the shore line?

A. Yes, from the channel.

Q. And from the channel, near Middle Island, extending south, the water shoals gradually until it comes to the shore line on the south?

A. Yes, sir.

Q. And then the entire territory there is a basin, deeper in the middle?

A. No, it is deeper in the channel.

Q. That is the middle?

A. Yes, sir.

Q. It deepens out to the middle, and then shoals to the other side again?

A. Yes, sir.

Q. How much deeper is it on the edge of the channel than it is in the channel?

A. It might be four or five inches.

Q. You mean four or five inches deeper in the center than the edge?

A. Yes, sir.

Q. There is four or five inches difference between the depths in the middle and edge of the channel?

A. Yes, maybe a foot.

Q. You do not know?

A. I know it is deeper.

Q. You have never been able to determine the difference?

A. I know that the boats go up there. They go in a direct line to get up.

Q. How wide is that channel?

A. I should say the channel there in the bay was probably ten to fifteen rods wide.

Q. And the bay itself is how wide at that point?

A. From Middle Island?

Q. From Middle Island across into Durbin Bay?

A. Oh, a mile I should say. Very nearly a mile.

Q. And there is a difference of about six inches or possibly a foot on the sides of the channel, you think?

A. Yes.

Q. Not more than this?

A. I do not think there is.

Q. And boats navigating pay no attention to the channel. They sail right across?

A. No, they follow the channel.

Q. They might sail right across?

A. It would depend on what kind of a boat.

Q. Any boat drawing three or four feet of water can sail right across?

A. No, sir. They follow the channel.

Q. You said the water was five or six feet deep in the channel?

A. No, sir. I did not.

Q. How deep did you say?

A. Four and a half or five feet.

Q. And it is three or four feet then on either side?

A. It will run from about five feet to nothing; four and a half to five feet to nothing.

Q. A boat drawing two feet can sail all over?

A. If they do not get too close to the shore, drawing two feet of water they could.

Q. Now, there is a channel extending from Squaw Is-

land down through Mud Creek Bay into Sandusky Bay called the channel of the Sandusky River?

A. Yes, sir.

Q. The channel has been marked with buoys?

A. Yes, sir. But it don't run through Mud Creek Bay

Q. What do you call this territory here?

A. That is the river.

Q. What is this in here?

A. That is the river.

Q. Part of Sandusky River?

A. Yes.

Q. What is this in here, from Winous Point?

A. That is Mud Creek Bay, where it empties into the Sandusky River.

Q. That is what you call the mouth of Mud Creek Bay? Between Squaw Island and Winous Point?

A. Yes, sir, where it empties into the river.

Q. Do you call it Mud Creek or Mud Creek Bay?

A. I call it Mud Creek Bay.

Q. This is Mud Creek up near the Horseshoe?

A. It is all Mud Creek.

Q. Mud Creek and Mud Creek Bay are all the same thing.

A. Yes, sir.

Q. This channel has government buoys through it?

A. Sandusky River has, yes, sir.

Q. These sticks are put through to mark the channel for deep draft boats going to Fremont?

A. Yes, sir.

Q. This channel has about twelve feet of water at that point?

A. I think about twelve feet.

Q. And it is kept open by dredging?

A. Yes, it has been dredged out at the mouth.

Q. If that channel was well defined with grass it would not need stakes?

A. They do not need the stakes when the grass is up, but there is not always grass there.

Q. There is a large season of the year there is no grass at all, and the government were obliged to mark it with stake?

A. There is no grass in the spring of the year.

Q. There is no way for a stranger to find the channel without the government channel stakes?

A. No, they stake it out in the spring of the year.

Q. How deep is the water on either side of that channel?

A. Well, it is all the way from two and a half to three and a half feet of water, I should think.

Q. Is it not five or six feet?

A. No, sir.

Q. How wide is that channel?

A. Between twenty and thirty rods, I should think.

Q. That channel extends down beyond Eagle Island, doesn't it?

A. It runs down to the east end of Eagle Island and Slade's Point.

Q. Doesn't it go much further than that?

A. I do not know.

Q. Do you know where the dredge comes east of Eagle Island?

A. It comes between Eagle Island and Slade's Point.

Q. Doesn't it go further east?

A. I do not know. I saw the dredge down there.

Q. You have observed in the summer time that this

eel grass grows upon either side of the channel where the current is not so strong?

A. Yes, it grows all along the river bank.

Q. The wild celery spreads out over the water?

A. Yes, sir.

Q. Can you not trace the channel by reason of the vegetation during the summer months?

A. I never noticed in particular.

Q. Don't you ever go down there?

A. Once in a while.

Q. Have you not noticed it?

A. I follow the river out. I do not cut across Slade's Point.

Q. You cannot do that?

A. Yes, I can—

Q. There is four or more feet of water there?

A. It will run from the river bank about four feet to nothing.

Q. You do not have to follow the channel from Eagle Island, but it is free from grass.

A. You can go right across from Slade's Point.

Q. What do you call this from Eagle Island to Slade's Point?

A. We call it the mouth of the river.

Q. And from Eagle Island to South Point?

A. That is the mouth of the south channel.

Q. Is there another channel south of Eagle Island?

A. The south channel of the Sandusky River.

Q. How deep is that?

A. Ten feet to eight feet deep.

Q. And that shoals gradually from the center either way to the shore?

A. No, sir.

Q. How much deeper is the water on the edges than in the channel?

A. The channel is about eight to ten feet deep, and outside of the channel is about four to four and a half.

Q. You claim there is a channel ten feet deep south of Eagle Island south running into Sandusky Bay?

A. It is eight to ten feet.

Q. Did you not swear in another case a few months ago that the waters were so shallow you could walk across?

A. No, sir, I did not.

Q. How deep is the water near the mouth of Tommy Creek?

A. Well, there it is about a foot deep, maybe a little more, a foot and a half.

Q. And deepens as it goes out towards this channel you were telling about?

A. It empties right out into the channel there.

Q. Boats can navigate through on the south side of Eagle Island?

A. Yes, light draft boats.

Q. And also on the north side?

A. Yes.

Q. It is not necessary for light draft boats to follow the channel at all coming up past Eagle Island?

A. Not if they do not draw over two feet of water.

Q. Or even four feet. Cannot they sail right over the banks of the channel?

A. No, they don't.

Q. They can, can't they?

A. I do not think they can.

Q. Now the territory lying back of the shore line is designated on this map as low and marshy, is it not?

A. Back in the marsh it is, yes, sir.

Q. And the south part of sections 17, 16, 15, 14, and 13 are all low and marshy?

A. That is about pasture land and such land as that, most of it.

Q. It is not cultivated?

A. No, sir.

Q. During high water it is under water, part of it?

A. If the water stands very high some of it is under water.

Q. In section 14, back of Slade's Point, all through there is a large piece of marsh, mallard holes, as we call them?

A. Yes.

Q. There are also some mallard holes in section 15?

A. I do not think there is.

Q. The territory lying south is all marshy land is it not?

A. There is some dry land; the principal part is marshy.

Q. It is most all marshy land. That extends over sections 32, 33, 34, 35, 36, and into the sections south of that also?

A. Yes, sir.

Q. And the water the last few years has been very materially lower than it was formerly up in this territory?

A. Yes, the water has been low.

Q. And the shooting club that hunts on the lands adjoining the Winous Point Club had to dyke the lands to hold the water in the marsh?

A. Not that I know of.

Q. You do not know about that?

A. No, sir.

Q. Now, when the water is highest, all the territory

here, Mr. Geralds, including the south part of sections 14, 15, 16, and 17, all of sections 21, 22, and 23, and 29, 28, 27, 26, 25, 24, and 32, 33, 34, 35, and 36 are submerged?

A. No, I do not think they are.

Q. What parts are not?

A. On the north they are not submerged.

Q. In the south part you said?

A. I said it was pasture land.

Q. Is this submerged in high water?

A. A little of it is if the water stands very high. It has not been for several years.

Q. How far back in the country in sections 17, 16, 15, and 14 does not the land hold the water at times of the highest flow, the point where the land checks the flow of the water, how far back in these sections?

A. At some places it is further back than it is other places. North of the club house it would not go not half way back, about a quarter of the way back, and other places a little further, and other places not so far.

Q. Horseshoe Island, at the time I speak of, the water at its highest flow, would be submerged?

A. In a northeaster.

Q. And all of Bixler's Point except possibly a small portion?

A. Yes, sir.

Q. Middle Island and Durbin's would be wholly submerged?

A. Yes.

Q. All of Canvas Back, Nigger Head, and all of Eagle Island except a few trees? And the territory lying between Tommy Creek and Coon Creek? And Peach Island and Graveyard Island and Cape Island?

A. Graveyard Island would not be, and part of Peach Island would not be.

Q. A small portion of land on Squaw Island would remain above water?

A. Yes, sir.

Q. All the rest would be submerged?

A. Yes, sir.

Q. At what point on the south side, in what is known as these upper bay marshes, would the land hold the water at times of its highest flow?

A. Well, it would not go back—well, over there a hundred rods some places.

Q. Than the marshes now go?

A. Yes.

Q. And the marshes go much further than are shown by this map?

A. Yes, I guess they are.

Q. So the territory then, that would be submerged when the water at its highest flow would correspond practically with the width of Sandusky Bay, when you see the map of Sandusky Bay here?

A. Yes, sir.

Q. Practically the shore line of Sandusky Bay?

A. It would be about under water, that marsh would.

Q. The shore line of Sandusky Bay, Mud Creek Bay, and all that territory would be about the same all around?

A. It would be all under water, the biggest part of it.

Q. You have had experience in fishing with a seine?

A. Not a great deal.

Q. You have fished then enough to know how they operate?

A. Yes, sir.

Q. Can you operate a seine in water less than two or three feet deep?

A. Oh, yes. You can pull a seine in I think less than two feet of water.

Q. And catch fish?

A. Yes, sir.

Q. Won't the fish jump over the seine?

A. No, they go back in the loose twine.

Q. In the bag of it?

A. Yes, sir.

Q. It could be hauled in a foot of water?

A. Yes, I think it could.

Q. You have never hauled one in that low water?

A. Never in les than two feet.

Q. None in a foot?

A. We have hauled out in a foot.

Q. You would start in deep water?

A. And sometimes the other way, we would lay it out on the bank.

Q. The usual way is from the deep water to the shealer?

A. Yes, they generally do that. It depends where they are; where they are fishing.

Q. This seine is laid out with a boat?

A. Yes, sir.

Q. You have operated it with a boat?

A. Yes, sir.

A. Not in open water.

Q. You could not operate it otherwise?

A. Not in open water.

Q. You could not haul this seine in the marsh?

A. Well, they haul in the channels in the marsh where there is some moss and some grass.

Q. Not in deer tongue?

A. No.

Q. In bulrushes?

A Yes, sir.

Q. Do you mean to say to the court that you can haul a seine through a bunch of bulrushes like that that grows upon Middle Island?

A. No, sir; scattering bulrushes.

Q. They must be very scattering?

A. Where they are pretty thick.

Q. You could not haul a seine through bulrushes that were too thick to navigate a boat through?

A. No, sir.

Q. You cannot haul a seine at all through lily pads, pond lilies?

A. Not if they are too thick.

Q. They do grow sparsely enough to haul through, do they?

A. I have helped haul through lily pads.

Q. When you can haul a seine you can run a boat?

A. In some places.

Q. In all cases where you can haul a seine?

A. No, sir; sometimes you can haul a seine through a marsh where there is not enough water for a boat.

Q. It will float these large lifting boats?

A. Yes.

By Judge Haynes:

Q. You have spoken of the submerged banks of the river and Mud Creek. How have you ascertained the height, or depth of the water?

A. I have sounded the water.

Q. You sounded it for that purpose?

A. No, I do not know as I did for that purpose. I have pulled a boat and poled up and down the river on the banks.

Q. Have you poled in the channel of the Sandusky River?

A. No, sir.

Q. It is only by these observations that you judge of the relative depth of the water and height of the bank that is submerged?

A. Yes.

Q. And the habits of the fish, are you familiar with these?

A. No, not very much.

Q. Enough to know what their habit is about running, or where you find them, or where they are congregating. Do the fish run up there for the purpose of spawning?

A. Yes.

Q. Where do they run, as far as you know?

A. Up into Mud Bay and in the marshes.

Q. Up the channels, the bank, or where?

A. I think through the channels.

Q. At other times, these that seem to live there, or summer there, where did you find them?

A. In Mud Bay, the rivers, and all the little streams like South Creek.

Q. More particularly in the channel of the Sandusky River?

A. More in the winter time. In the summer time when it is warm they get out in shoaler water.

Q. Do they go along the shore, the submerged banks, or near this growth, for the purpose of feeding? Do they feed among that or not?

A. Yes, sir.

Q. What kind of fish largely do you find up through there?

A. We get German carp, black bass, grass pike, perch, sunfish, bullheads, rock bass, some catfish.

Q. Any pickerel?

A. A few pickerel.

By Mr. True:

Q. These are the same kinds of fish exactly that exist in the lower bay?

A. Yes, I think they are.

Q. The carp are the most numerous of any?

A. Yes, sir.

Re-examination by Col. Bartlett.

Q. Mr. Geralds, what is the fact as to the fish that you speak of, many of them, using the marshes for spawning purposes?

A. Yes, they use the marsh for spawning purposes.

Q. And in the summer season what is the fact as to their being in the channel and along the edges of the channel upon the channel bank in the growth of vegetation largely, feeding?

A. Yes, they feed along the banks and in this grass.

Q. And in the fall of the year, as the water grows cooler they congregate more in the channel?

A. Yes, sir.

Q. And in the winter season they are out of the marshes and the low waters into the deep channels?

A. Yes, sir.

Q. What is the fact as to the ice, in the winter season, on these flats that you speak of, freezing down to the ground, leaving no water between the ice and the earth of the flats, outside of the channel of the river?

A. Yes, sir; it freezes right down to the earth.

Q. So that there is no water on these flats when it is reasonably heavy ice?

A. No, sir; there is no water under it.

Q. All confined to the channel?

A. Yes, sir.

Q. Now, you spoke of never having poled in the channel of the river. Why?

A. The water was too deep.

Q. Is there a sloping bottom leading from the channel bank to the shore line, that the water is much shallower, and upon which you pole in your small boats?

A. Yes, sir.

Q. Now, you spoke of the territory there being submerged at times in high waters. In the course of nineteen years how many times have you seen it submerged as you have described?

A. Oh, a great many times.

Q. I do not think you understand me. Mr. True was calling your attention to the fact that at some seasons, and under some circumstances, of the water extending back in the country over the lands to the north and south here, and reaching approximately the same width of water as there would be in Sandusky Bay? How many times in nineteen years have you ever seen that?

A. I have seen it several times.

Q. More than two or three?

A. Yes, probably six, eight, or ten times, maybe a dozen times, yes, sir.

Q. What is the fact as to at such times, the water being unusually high, connected with freshets and winds that raised it?

A. The wind is what does it, and freshets.

Q. The two?

A. Yes, sir.

Q. A freshet coming down the river and Mud Creek Bay, encountering a northeast wind, will raise the water higher?

A. Yes, sir.

Q. It was at such times that you say it flooded the country?

A. Once in a while it was like that, and other times just northeasters.

Q. What is the fact as to the northeasters flooding this territory less than it did before the construction and closing in of the bridge across the bay, the railroad bridge?

A. Well, the water does not come up so quick.

Q. It requires now a much longer continuous wind from the easterly or northeasterly direction to raise the waters than it did formerly?

A. Yes, I think it does.

Q. Does the water of late years, and since the construction and closing in of the bridge there, raise as high above in northeasters as it did before?

A. Well, I do not think as high, or quite as high.

Q. Is that owing to the cessation of the wind before the raising of the water?

A. I do not know.

Q. Have you been down to the bridge and noticed if the water was higher on the east side than on the west side, owing to the obstruction that the bridge has occasioned?

A. I do not know that I ever noticed it.

Q. Speaking of finding the channel of the river, do you mean to be understood that without the grass along the bank of the river, the channel bank, and without the buoys that are

placed there by the government, that the channel could not be found?

A. It could not be found so easily.

Q. What would a pole or lead line do?

A. That would find it.

Q. That is frequently resorted to in sailing in finding the depth of the water?

A. Yes, sir.

Q. And in guiding yourself in the channels?

A. Yes, sir.

Q. Now have you at times seen the water off of these flats in this locality here?

A. Yes, sir.

Q. At such times what have you noticed with reference to the channel of the river?

A. Well, I have saw it with the flats all dry except in the channels of the river.

Q. And how high have you seen the channel bank above the surface of the water, in the channel of the river, at such times?

A. Well, I saw it a foot or a foot and a half, such a matter as that.

Q. At such times the channel bank was easily determined, and its character?

A. Yes, sir.

Q. What is the fact as to that being or nearly vertical or perpendicular bank?

A. It is very nearly perpendicular; slightly sloping.

Q. In poling along would you certainly lose the pole when you reached the channel, being so deep that you could not reach bottom?

A. Yes, sir.

Q. At such times have you noticed Mud Creek, leading from the river channel up west, when the water was out?

A. Yes, sir.

Q. What is the fact as to there being a channel of water, a continuous channel, running through the center of Mud Creek at such times?

A. There is a small channel.

Q. Showing water, when upon each side land was shown?

A. Yes, sir.

Q. And did that channel continue uninterruptedly as far as you have described?

A. Yes, sir.

Q. Up to Middle Island, and turning there and running in a northwesterly direction?

A. Yes, sir.

Q. And then around Long Point in a southwesterly direction?

A. Yes, sir.

Q. Then along up west again?

A. Yes, sir.

Q. You have seen the channel on that route at the times the water was blown out, when the land on each side of it was bare?

A. Yes, sir.

Cross Examination by Mr. True.

Q. How much lower was the water at this time you were telling about when these flats were dry, than the ordinary stage of water?

A. Well, these banks along the river banks—I should think the water was about two feet lower.

Q. Lower than the ordinary stage of the water?

A. When it was blown out.

Q. You do not understand me. You stated you had seen this territory, in a strong gale from the west, with the water blown off the flats, and you could see the bank of the channel down there.

A. Yes, sir.

Q. At that time how much lower was the water than the ordinary stage of the water?

A. I said from two and a half to three feet or four.

Q. Did I not understand you to say you could see a perpendicular bank above water two or three feet?

A. One and a half or two feet.

Q. It might be four feet or five?

A. Some places the bank is higher than at other places.

Q. Then there would be a difference between the day you saw it lowest and the ordinary stage of water of about six feet?

A. I said it would be two or three feet below the ordinary stand.

Q. How is it, Mr. Geralds, that you could see a perpendicular channel bank standing up two feet above the water where there is four feet of water at an ordinary stage?

A. I was not down there; I was by the flats at Squaw Island.

Q. At the Middle Ground, where the water was about two feet deep?

A. Yes, sir.

Q. You did not mean the channels of the river, running down from the bank?

A. I said the banks of the river.

Q. Have you ever seen the banks of the channel at Long Grass Point?

A. Yes, sir.

Q. At that time how much lower would the water be than the ordinary stage?

A. Two and a half to three feet.

Q. How much water is there on the banks by Long Grass Point?

A. On the south side there is about a foot.

Q. And on the north side?

A. About three or three and a half.

Q. And you never saw that dry on the north side?

A. Yes, sir.

Q. Then it would be three and a half feet lower than ordinarily?

A. Yes, sir.

Q. How much higher is it during the high stage of the water?

A. In a northeaster it would probably be two or three feet, about three and a half, or maybe four feet.

Q. Then the difference between the lowest and the highest stage of the water would be about seven or eight feet?

A. Well, about six feet, I should think.

Q. You stated that the highest water was when a freshet was coming down and a northeast wind coming up. The fact is, when the wind is northeast the current runs up clear to Fremont.

A. I do not know; I was never up there.

Q. You never saw the current running down when the wind was northeast?

A. Yes, sir.

Q. Will you explain to the court how the waters of Mud Creek could overflow from a northeaster and still have a current running down?

A. In the spring of the year, whenever we have a freshet the water is all over the banks, and lots of times it meets a heavy northeast wind.

Q. And the country would overflow with water with a northeast wind, or not?

A. Not near so much.

Q. Then the current at that time would not run up the Sandusky River? With a big northeaster?

A. No, sir; I never saw it with a big northeaster.

Q. How often have you ever seen that condition of affairs?

A. Probably two or three times.

Q. In your life time?

A. Yes, sir.

Q. These waters of Mud Creek rise and fall with the waters of the bay from day to day?

A. Yes, sir.

And thereupon plaintiff to further maintain the issues on its part introduced as witness

GEORGE RUDDOCK,

who, being duly sworn and examined, testified as follows:

Direct Examination by Mr. Holding.

Q. Mr. Ruddock, you live in the vicinity of the Winous Point Club?

A. Yes, sir.

Q. You sometimes do some punting for the members up there, I suppose?

A. I patrol for them.

Q. Now, Mr. Ruddock, at my request did you a short time ago make some soundings in Stager's Bayou and Nolan's Bayou, in section 21?

A. I did.

Objected to by defendant.

Q. What depth of water—or what time was it?

A. About December 1, 1899.

Q. What was the depth of water in these two bayous?

A. About eight inches.

Objected to by defendant.

Q. Mr. Ruddock, in taking these soundings, did you make it by any gauge?

A. I did.

Q. By what gauge did you make it?

A. There is a water gauge at the club house, and we have the common stand of water there, and we go by that, and then I had a pole marked by feet and inches, and if the water was blown out any I would go by the gauge at the house, and would average it up that way.

Q. Do you know whether that water gauge at the house was in good condition?

A. Yes, sir.

Q. It was correct?

A. It was.

Q. And when did you make these soundings?

A. About December 1st.

Q. 1899?

A. 1899.

Q. Explain the water gauge.

A. In front of the Winous Point Shooting Club they have a breakwater, to break the water from coming into the

boat house, and there are spiles driven around and filled in with stone, and a board nailed upon one of the spiles, and marks of feet and inches on this board, and if the water as a general thing stands, say two feet out there, if the wind would blow from the west perhaps it would drop, just according to the wind, six inches we will say, or rise if it blew from the eastward. You can go by this gauge. If it blew from the south it would drop say six inches. If there was no wind at all it would stand at a certain point.

Q. How do you measure water in the bay by that operation?

A. If I was out sounding and I would leave the house at a common stand of water, and the wind would blow, probably I would be gone from one to two or three hours, and if I had these soundings, and when I came in if the water had dropped on that gauge say six inches, I would average up my soundings by that. I count of course that I can come within an inch or two.

Q. You only average the depth by telling the variations at this point where you land?

A. Yes, but I did not have but very little trouble. I had a good stand of water while I was sounding.

Q. How long have you known this territory of the Winous Point Shooting Club?

A. I have been around there for the last ten years; right around the marsh.

Q. How frequently have you been over it in any way?

A. In the last three years I have been over it, very nearly all over it every day during the fall months, in September, October, and November.

Q. In taking these measurements about which I have

already asked you, and which I shall ask you about, were you familiar with the territory in which you took these measurements?

A. Yes, sir.

Q. You may state to the court how the measurements taken by you, in December, 1899, in Nolan's Bayou and Stager's Bayou, compared with the ordinary depth of water in these bayous, in 1893 and 1894, which you know, and during the whole time you have known of it?

A. They compared very nearly alike; perhaps it was a little lower than it was in 1893 and 1894; very little.

Q. Do you know where Green Wing Bay is?

A. Yes, sir.

Q. What was the depth of water in Green Wing Bay?

A. I think six or eight inches; somewhere along there

Q. You know where Gardner's Bayou is?

A. Yes, sir.

Q. What is the depth of water there?

A. About six inches.

Q. You know where Pin Tail Bay is?

A. Yes, sir.

Q. What is the depth of the water there?

A. There is about a foot or a foot and a half of water.

Q. You know where Leonard's Bay is?

A. Yes, sir.

Q. What depth of water there?

A. About two feet or a foot and a half.

Q. You know where Mallard Bay is?

A. Yes, sir.

Q. What is the depth of the water there?

A. It will run from one inch down to two and a half feet, or up rather.

Q. You know where Standard Bay is?

A. Yes, sir.

Q. What depth of water there?

A. I do not just remember that now.

Cross Examination by Mr. True.

Q. Were you a patrolman for the Winous Point Club in 1893 and 1894?

A. No, sir.

Q. You did not take any measurements of the water in 1893 or 1894 in these bodies of water you speak about?

A. No, sir.

Q. How do you know the measurements taken in 1899 were similar to those in 1893 and 1894?

A. I poled through the water.

Q. You took no measurements?

A. No particular measurements; no.

Q. You are merely guessing?

A. Not merely guessing. I can tell very nearly how it stood then and now.

Q. You did not measure?

A. No.

Q. Do you not know, as a matter of fact, that the water stood a foot or eighteen inches higher in 1893 and 1894 than in 1899?

A. No, I do not think it was.

Q. Do you not know they have had to dyke a good many of the marshes?

A. I do not know of any dyking.

Q. Have you not seen those large dykes over in the south marsh, in Sandusky county, on the lands of the club next south of the Winous Point Club?

A. Oh, I know, of course. Yes, they put in some dams.

Q. I supposed a dam and a dyke was the same thing?

A. I never understood it to be the same.

Q. There are dams?

A. Yes, sir.

Q. They have all been put in since 1894?

A. I think they have.

Q. They have been put in in order to hold the water in the marshes?

A. Yes, sir.

Q. By reason of the low water since that time. You know that, don't you?

A. I presume probably it is.

Re-examination by Mr. Holding.

Q. How was the water in 1899 as compared with the water in 1894 and 1893, higher or lower?

A. I think is was a little lower last year than in 1893 and 1894.

By Judge Burrows:

Q. You think it was lower last year, did you say?

A. Yes, sir.

Cross Examination by Mr. True.

Q. Don't you know that Mr. Thompson and other game keepers of the Winous Point Club built dams across the creeks last fall to keep the water in?

A. I did not help.

Q. You knew of this being done?

A. Yes, sir.

Map introduced by plaintiff, marked "Exhibit X."

Objection by defendant. Exception.

And thereupon the plaintiff to further maintain the issues on its part introduced as a witness,

LOUIS JONES,

who, being duly sworn and examined, testified as follows:

Direct Examination by Col. Bartlett.

Q. What is your given name, Mr. Jones?

A. Louis.

Q. Mr. Jones, are you acquainted with the territory in controversy here in this action?

A. Yes, sir.

Q. How long have you been acquainted with it?

A. About twenty-five years, or twenty-six.

Q. During the time of your acquaintance with it what has been your business in part?

A. Well, when I first came on the river I was boating wood on a wood scow, and some stone.

Q. Between what points were you boating wood and stone?

A. Well, we have went up Mud Creek two or three trips as far as the first bridge upon Mud Creek, and we went and loaded in the mouth of South Creek, up perhaps opposite what is called the bar, at the mouth of Peach Island Creek. We would lighter wood down that far and load it there.

Q. Now, what size boat did you sail in boating wood and stone as you have spoken of?

A. Well, when she was loaded I should think she would draw four feet of water or very near it; perhaps not quite that much, and we have taken from the bay shore, where we have

good water, thirty-five cords of dry wood on her, but we never loaded that much up the creek; perhaps twenty or twenty-five cords.

Q. What was the length of the boat?

A. About sixty feet I should think. I do not recollect exactly.

Q. Over all or on the water line?

A. Over all.

Q. What beam?

A. I should say twenty or maybe thirty feet.

Q. What was her build?

A. She was a flat bottom boat.

Q. A scow?

A. Yes, sir.

Q. A sailer?

A. Yes, sir.

Q. You carried canvas?

A. Yes.

Q. How many masts?

A. Two.

Q. Fore and aft rig?

A. Yes, sir.

Q. Did you carry a center-board?

A. Yes, sir.

Q. What would she draw light?

A. A foot and a half.

Q. Eighteen inches light?

A. Yes, sir.

Q. You say you have undertaken to navigate Mud Creek up to the drawbridge?

A. Yes.

Q. The drawbridge is across Mud Creek on the road leading from Fremont to Port Clinton?

A. Yes, sir.

Q. About what is the distance from the Winous Point Club House up to where the bridge crosses the creek?

A. Well, I do not think I have been up here since I sailed there. I think it is about four miles. I do not recollet.

Q. What are your experiences in working the channel of the waters of Mud Creek in your navigation?

A. Well, when we had a fair wind we usually sailed out and in, and if we did not we poled until we got out. Sometimes we could get a slant and sail part way and pole part way, and sometimes we had to lay by a day until we could get a fair wind.

Q. State whether the channel is sufficiently wide and deep to enable you to beat up against the wind?

A. Well, I do not think it was. Not with our boat. We might have possibly beat some places light, but never could loaded.

Q. Would that be when you would catch a slant?

A. Yes, sir.

Q. When you catch a slant?

A. Yes, sir.

Q. And make a long leg and a short one?

A. Yes, sir.

Q. Beating up directly against the wind, could you?

A. No, sir; we never tried that.

Q. When the wind was adverse, I understand you poled out against it?

A. Yes, sir.

Q. Do you know whether there was a sufficient depth of

water out of the channel for you to work your boat? At an ordinary stage of water?

A. Yes, sir. Sometimes she ground up the mud some, but I do not know that we loaded her with a full load on these creeks; I do not know as we did. It seems to me that we did not load as heavy as when we boated out of the bay.

Q. Do you remember what you drew in coming out of any of the creeks with loads?

A. With cord wood, do you mean?

Q. Yes; how much water did you draw?

A. Between three and four feet, somewhere along there.

Q. With a draft of three or four feet could you work your boat out of the channel of the creek?

A. No, sir.

Q. Not sufficient water?

A. No, sir.

Q. State what the fact is as to that channel in the creek being a continuous channel from the mouth as far as the bridge?

A. Well, it is a channel there; I think it is wider in some places than it is in others.

Q. What I mean is, whether or no it continued the whole distance?

A. Yes, sir; it does.

Q. It is deeper in the center, and sloping up each way?

A. Yes, sir.

Q. Do you know a point called Middle Island?

A. Yes, sir.

Q. When you reach that point, which direction does the channel lead, going up?

A. Going up it turns off very nigh to the north around Middle Island, and runs northwest or very nigh north.

Q. Then working around Long Point?

A. It turns south again, or very near south.

Q. Then working up along Bixler?

A. Then it turns west, and the course goes pretty much straight west from there.

Q. I believe you said that you at one time boated wood out of the mouth of South Creek?

A. Yes, sir.

Q. Was the wood landed on the bank near the mouth of Peach Island channel?

A. No, sir; it was banked up by the landing, what we called Rice's Landing, on the Rice farm.

Q. Up above Hickory Island?

A. Yes, sir.

Q. How long ago was it that you boated wood up there?

A. It was about twenty-four or twenty-five years ago.

Q. With the same boat that you have spoken of?

A. Yes, sir.

Q. As boating in Mud Creek?

A. Yes, sir.

Q. In boating and coming down South Creek into the river, what course did you pursue?

A. We went north into the channel of the river.

Q. State whether or not you followed the channel of the river in your navigations or used other waters?

A. We followed the channel.

Q. Could you use the Middle Ground there for the purpose of navigation at such times?

A. No, sir; not with that boat.

Q. Why?

A. There was not water enough.

Q. Whereabouts did you haul stone?

A. Well, we hauled stone for farmers, for barns, more or less. I do not know that we ever brought a full load of stone up.

Q. To what points did you haul them?

A. We hauled some up to Mud Creek Bridge.

Q. And brought wood back?

A. We brought a good many stone into the mouth of Coon Creek.

Q. Out on the bay?

A. Yes, sir.

Q. That is east or southeast of any of this territory here?

A. Yes, sir.

Q. Are there any other points that you navigated between over these grounds than what you have spoken of?

A. No, sir; not that I recollect of.

Q. Do you know whether Mud Creek is used now, and has been for a number of years, for the purpose of navigation?

A. I have not seen any large boats up there, boating wood or stone or anything, for a good many years; quite a number of years.

Q. What kind of boats did you say?

A. Large scows.

Q. What do you denominate large scows?

A. The same as we have used, or smaller. I have not seen anything more than fishing boats for a good many years; pound boats.

Q. About what length, beam, and draft?

A. About twenty-five or thirty feet long over all.

Q. What beam?

A. They differ. Some are smaller and some larger. I think the average would be about twelve feet beam.

Q. What would be the draft?

A. Some I do not think would draw over eight inches of water light, and some would draw over a foot.

Q. When they navigated the waters of Mud Creek above there, do you know what courses they sailed with reference to the channel of the creek?

A. Well, I have seen them beating up. They usually keep one course if the wind will allow them to, I notice, in going up.

Q. That would be sailing light?

A. Yes, sir.

Q. And in that course following the direction of the channel as near as the wind would permit them to?

A. Yes, sir.

Q. Have you seen the waters of Mud Creek blown out at any time?

A. Yes, sir.

Q. What did you notice at such times as to the channel running up the creek and in the direction which you have described it to-day?

A. Well, there is a channel. It goes from the river up past Winous Point south to Middle Island; that is as far up as I could see it, to as far as Eagle Island. It is lower than what it is on either side.

Q. That is as far as you have traced the channel up? You were not above when the wind had blown the water out?

A. I could not say anything about that.

Q. In the lower and more open part you discovered this condition?

A. I came from the club house, and we had to shove the boat. Col. John Hay was with me. It was about two and a half feet of water from the bank of the river.

Q. What season of the year was that?

A. I think it was in November.

Q. Was Col. Hay one of the members of the club at that time, and here hunting?

A. Yes, sir.

Q. And the boat that you spoke of, in shoving her out, was that a duck boat?

A. Yes, sir.

Q. Did you shove out into this channel where the water had still remained in it?

A. You mean the river channel?

Q. Did you come from the club house?

A. Yes, sir.

Q. In leaving the dock at the club house, did you shove out to the channel?

A. There was water straight through there from the club house perhaps fifteen rods, just enough to cover the ground with. When we got nearer the river the channel was narrower there. When you got near the river bank the water was conducted through a small channel, so that the boats run off down into the river.

Q. At that time, and with the condition of the waters at that time, what was the fall of the water from the channel of Mud Creek down into the water in the channel of the river? How much fall was there there?

A. About a foot and a half or two feet.

Q. Where the water ran out of this rivulet channel into Mud Creek down into the channel of the river?

A. Yes, as I recollect it.

Q. Do I understand you then that the water in the channel of the river was that much lower than the water in the channel of Mud Creek before it made its descent?

A. Yes, sir.

Q. Do you know about what the difference is in the depth of the channel of Mud Creek and the river where the channel of Mud Creek empties into the river?

A. No, sir; I could not tell you anything about that.

Q. Can you tell which is the deepest?

A. Oh, yes, the river is the deepest.

Q. Can you approximate about how much?

A. That day I poled in about four feet of water, I should think, on the river.

Q. After you entered the river?

A. Yes, sir; I think about four feet. I recollect that.

Q. At that time that you speak of was there any water over any portion of the Middle Ground?

A. No, sir.

Q. The Middle Ground was all bare?

A. Yes, sir.

Q. Do you know whether there was any water over the portion of ground that lies north of the channel of the river?

A. Not as far as we could see from the river.

Q. You know what I mean; looking north just below Winous Point?

A. I could not see any water looking to the north.

Q. So that the ground both on the north and south, which would be the Middle Ground on the south, and the space there on the north of the river channel, was bare on both sides?

A. I think it was.

Q. Where did you go to that day?

A. We went up the river to South Mud Hole, up above the mouth of Green Creek. I walked into the Mud Hole.

Q. You followed the river channel up then?

A. Yes, sir.

Cross Examination by Mr. True.

Q. You formerly sailed on a scow up there sixty feet long and about thirty feet beam?

A. I do not think it was quite sixty feet. It was quite a large scow. It has been twenty—that is what I said, but I do not know exactly; it has been twenty-three of four years ago.

Q. And you used to haul wood and stone from different points up Muddy Creek to different points on Lake Erie?

A. We never were on Lake Erie, without Sandusky Bay was called Lake Erie. We hauled to Sandusky.

Q. You never took any to Kelly's Island?

A. No, sir.

Q. Where did you get your stone?

A. On Johnson's Island, and at Hartshorn's.

Q. You have often sailed up with the scow when the wind was ahead?

A. Never up Mud Creek over three or four times.

Q. And these times did you ever happen to be there with head wind?

A. Oh, yes.

Q. You have tacked up the bay west of Winous Point several times?

A. Not with that scow.

Q. Have you not in other scows?

A. No, sir; I never sailed on any other scow. I have on a fishing boat.

Q. You have tacked from side to side with a fishing boat?

A. Yes, sir.

Q. How large a fishing boat?

A. A common pound boat.

Q. About thirty feet long and twelve feet beam?

A. Ten or twelve foot beam.

Q. In about a foot of water; eight to ten or twelve inches of water?

A. Yes, sir.

Q. Was it carrying fish to market principally?

A. Yes, sir.

Q. Do you know the market to which the fish are taken from this vicinity usually by these pound boats?

A. Some to Sandusky city, and some to Port Clinton.

Q. And the distance is how far to Sandusky city from this point?

A. From Winous Point?

Q. Yes.

A. Well, I should think it was about sixteen miles.

Q. And these boats carried fish that distance to market?

A. Yes, sir.

Q. You have also tacked these pound boats about the water in here, haven't you, Mr. Jones?

A. Yes, on the river, and sometimes north of the river.

Q. And you ran away over into Durbin's Bay?

A. Oh, no; I do not think so.

Q. Away beyond Middle Island?

A. Well, there is a deeper place lays between Heddick's Point and Middle Island; we have gone in there.

Q. And in Horseshoe Bay?

A. I do not think I have ever been there myself.

Q. You have seen others?

A. Well, I have, yes.

Q. All around Horseshoe?

A. I do not know that I saw them all around.

Q. You have seen them all around north of the island, or rather east?

A. I have seen them in there.

Q. These thirty-foot boats have center-boards?

A. Yes, sir.

Q. You have sailed up with the center-board down?

A. Yes, sir.

Q. You can sail right through these rushes with sail boats?

A. Yes, sir; if they are not too thick or you do not put your center-board down too low. When we sail on shallow waters we usually do not put the center-board clear down.

Q. And you sail over the Middle Ground with the center-board up?

A. With the lower end in.

Q. Lily pads and bulrushes do not obstruct navigation?

A. Where they grow too thick they do.

Q. Only in a very few places?

A. A good many places on the Middle Ground.

Q. And some places the grass grows too thick to run boats through?

A. Yes.

Q. During the spring you can sail all over?

A. I have seen it on the Horseshoe so that you could not sail there.

Q. In the spring mostly you can sail all over?

A. Not all over; I do not think you can, with a common stand of water.

Q. During the months of March, April, May and June, other than a little territory around Cape Island and the Mid-

dle Ground and Stony Point, is there any other territory that you cannot sail these boats through during these months of the year?

A. You might light with a fair wind sail through the Middle Ground.

Q. Can you sail right over what they call Middle Island?

A. I do not think you can.

Q. How much water is there on Middle Island?

A. I do not think at a common stand of water, more than four or five inches.

Q. If the water was a little high you could sail over?

A. If the water was high enough, and you had no center-board.

Q. You told about a time you saw the water very low in Mud Bay.

A. Yes, sir.

Q. When was that, Mr. Jones?

A. I do not recollect exactly; it has been about four years ago, and perhaps five.

Q. Was it late in the fall?

A. It was in November.

Q. Just about the time it froze up?

A. I do not think it was as late as that. Perhaps the first to the middle of November, perhaps earlier than the middle.

Q. The months of October and November are the months that the water is lowest in this territory?

A. It gets lower in the winter.

Q. Gets still lower?

A. I think it does.

Q. The water begins to go down after the middle of July up in there?

A. Yes, sir.

Q. And keeps getting lower until the middle of the winter?

A. Yes, sir.

Q. And then begins to raise again to the middle of July?

A. It varies about six inches in a season.

Q. This time you spoke about was an extraordinary wind storm from the west?

A. Yes, a gale.

Q. The water was blown away out of the bay?

A. Yes, sir.

Q. How much lower was it than the average stage of the water?

A. I should think it was six feet.

Q. Lower than the average stage?

A. I should think so.

Q. You never saw it that low before in your life?

A. I saw it that way once before.

Q. You have known the place about twenty-five years?

A. I was not at that place, but was on the back bay, down near Coon Creek.

Q. At that time, from Bixler's Point to Winous Point was about dry except a little pool about six rods wide?

A. Yes, sir.

Q. Was it a gradual slope to the shore line?

A. It was flat for about six rods, and then went right off to the shore.

Q. It was all dry so that you could see it very plain?

A. Yes.

Q. The water was about six feet low?

A. Yes, sir.

Q. And when the water was very low there was still some water left in the basins?

A. Up opposite the point there was some water left in there, and a little channel cut in there to the river. It is quite a piece down to the mouth of the river from the point.

Q. You did not see any of the channel banks that went down perpendicularly?

A. They slanted down.

Q. Down here?

A. Where it went into the river.

Q. It is still deeper in the bay at that point, past Squaw Island, going into Sandusky Bay, the channel is deeper than in the surrounding territory?

A. The water stood on the surrounding territory.

Q. I understood you to say that the water was about four feet deep in Sandusky Bay?

A. That is about what I thought when I poled along there.

Q. If the average stage was twelve feet, and there was only four feet, the water would be about eight feet low at that time?

A. I do not know the depth of the channel.

Q. The water was so low that you could see the bank of the channel where the Sandusky River came up?

A. As far as you could look.

Q. It extended away down below Eagle Island?

A. I do not know; I could not see that far. I have seen it dry that far; I will tell you about that channel down there; I have been there once in low water with Mr. Clark. We went below the cut of Eagle Island before we could get out of the channel on the north side into the Battle Grounds, as

it is called. We went below the cut of Eagle Island before we could get out on the north side.

Q. Did you notice a definite channel way down into Sandusky Bay?

A. I could see it some distance below where we were.

Q. Did you haul any stone for that riprapping up through there?

A. Yes, we put that from the north side of the bay to the south side on a lighter. We did not haul any on the scow.

Q. Do you remember when the steamer Dessault hauled a lot of stone up there?

A. Yes, sir; I recollect.

Q. She went right in to the shore and unloaded?

A. I never saw her in at the shore.

Q. Around these points?

A. Sometimes she was from twenty to thirty rods from the shore. I saw her at one time unload some planks on Winous Point in very high water, but was never around much when they were unloading, because I was not there at the time they were hauling.

Q. They built a breakwater around the docks at Winous Point?

A. Yes, sir.

Q. For the purpose of breaking the seas from washing in on the docks and boat houses?

A. Yes, sir.

Q. When the wind blows here, as we sailors say, it kicks up a big sea.

A. Yes, where there is no vegetation.

Q. A big sea rolls up and down?

A. Yes, sir; in all open waters.

Q. That is all open water at that place?

A. Yes, sir; at the club house.

By Judge Parker:

Q. It does not require much depth of water to get up a good sea?

A. Not if the wind blows hard.

Re-examination by Col. Bartlett.

Q. Shoal water produces a stronger action on the shore than deeper water?

A. I think it does.

Q. It is more like surf?

A. Yes.

Q. More wearing in its character?

A. I think it is.

Q. You were speaking of the breakwater at the Winous Point Club House. Is that a breakwater or dock?

A. It is both, you might say, as I understand it. It was to break the sea off, and for a dock, and to keep the ice from shoving the platform down. That I think was the principal thing it was built for.

Q. It extends out in front of the sloping platforms that are laid from the boat house behind it?

A. Yes.

Q. And forms a dock where small boats can tie up to?

A. Yes, sir.

Q. At times of heavy winds a foot depth of water will kick up quite a sea, won't it?

A. Yes, sir; a half foot.

Cross Examination by Mr. True.

Q. Have you ever seen any waves except upon the waters of Mud Bay?

A. Oh, yes; I have saw some on Sandusky Bay.

Q. Will this riprapping that you saw in Mud Creek Bay resist the waves at Marblehead?

A. I do not think that would.

Q. Did you mean to convey to the court that the waves in shallow water would be more destructive than in deep water?

A. What I understand was that if the water washed over the land it would not wash it away as much as if it washed against it.

Q. If the water is shallow, the water breaks right over it, does it not?

A. Where there is a bold shore.

Q. Is this a bold shore?

A. It was perhaps from six inches to two feet high.

Q. Was the water that deep?

A. Along the land before the stone was put on, and in some places it was perfectly level and sloped right off in the marsh. Some places I suppose, and some was not.

By Col. Bartlett:

Q. You were speaking of these shores which you speak of, do they run out to nothing at all, or is there a little birm there at the shore where the water joins?

A. There is usually something washed up there.

Q. And the small waves undermine that?

A. Yes, sir; but that does not wash as much as a bold shore does.

And thereupon the plaintiff rested its case.

WITNESSES FOR THE DEFENDANTS.

And thereupon the defendants to maintain the issue on their part introduced as witness,

CHAS. E. DEWITT,

who, being duly sworn and examined, testified as follows:

Direct Examination by Mr. True.

Q. What is your name?

A. Charles E. DeWitt.

Q. What official position do you hold, if any?

A. County Surveyor of Ottawa county.

Q. How long have you been County Surveyor?

A. Since the first Monday of January, 1892.

Q. I will ask you what this record is I show you here?

A. That is a certified copy of the original field notes and plats of the Government survey in the sections of Ottawa county.

Q. Will you turn to the field notes and map of Ottawa county in there, covering Bay township and the bay territory. Now, I wish you would explain to the court what that is that you have there?

A. That is a detailed plat of a portion of this township, Township No. 6, North, Range No. 16, East. It is a detailed map of the original survey.

Q. When was that made?

A. In 1820, by Sylvanus Bourne.

Q. Who was he?

A. A Deputy United States Surveyor, I suppose.

Q. Are they authenticated?

A. Yes; certified by Samuel Galloway, Secretary of State at that time.

Q. Beginning in section 24, show the court how far the land was surveyed in that survey.

Objected to by plaintiff.

Court: You may offer the plat in evidence and let it rest at that.

Q. I will show you a deed here, Mr. DeWitt, that was offered by the plaintiff, and ask you to show the court upon this map the territory covered by that deed.

Objection by plaintiff. Overruled.

A. It appears to be a deed of section 24, embracing Eagle Island. It goes further to say, being all that tract known as and marked "Eagle Island," section 24 originally embraced Eagle Island, 124 acres, and a fraction on the main land of about twelve acres. I see no reference here to the fraction on the main land. It starts out with fractional section twenty-four.

Q. I show you another deed, conveying land in section 23. Show the court where the premises are covered by that deed?

A. This is of a part of section 23 and part of section 21. It starts out: "Known as the east part of the north part of the southeast quarter of section 23, containing 13 10-100 acres of land." The east part of the north part of the southeast quarter. E. B. Sadler, grantor. Section 23. There was never any original southeast quarter in section 23. Section 23 is a fractional section.

Q. On the original field notes how would that be located?

A. It is divided in lots instead of quarters. I do not mean that the land was not there. I mean the description was defective because it called for a quarter when it should have stated a lot. It should have been the south part of lot 6.

Q. Can you tell how much of that territory on this map that embraces, and point it out on the map?

A. I can get pretty close to it, yes. (Points it out.) It embraces what lays south of that line (drawing a line on the map.) I take it that that is the land intended on the deed.

Q. Mr. DeWitt, you may state what map that is before you?

A. That is a map of the territory in the south part of Bay township, embracing Muddy Creek and a part of the Sandusky River.

Q. Beginning at Slade's Point, Mr. DeWitt, you may describe the sections of land embraced in the territory covered by your map?

A. Beginning at Slade's Point there is section 24, of which a small corner of land is left, and the balance is washed away. 24 also includes Eagle Island, and that is nearly all washed away.

Q. About how much of Eagle Island was there—when did you make this map?

A. In 1894.

Q. In what month?

A. February. I made the survey in February.

Q. How much of Eagle Island was there at that time?

A. I believe 124 acres and a fraction.

Q. When you made the survey?

A. About two acres.

Q. That is in section 24?

A. Yes, sir.

Q. Now proceeding west?

A. Then next west is section 23. I do not know the number of acres it shows on the original plat; the number of acres that embraces on the original.

Q. What land, if any, do you find in section 23?

A. I do not know; I have not calculated the area of it.

Q. Just name the territory that you found there?

A. Long Grass or Canvas Back Point at the extreme southeast, and back from about a little above the half section line, what would be the half section line, the shore of the marsh begins and runs around in that shape; back of that another or deeper shore, where the dry land commences, is indicated by the blue line, shaded blue.

Q. Explain to the court what the dotted marks on your map represent?

A. They represent the marsh grass, in the shape I found it growing or existing at that time, not only on the main land but in the water.

Q. What is the dark line with the blue line? What does that represent?

A. That is the shore line at the edge of the water, what we would call the beginning line, out back from the wet marsh.

Q. Now, what land and marsh did you find in section 23?

A. It is 23 that we have just went over.

Q. Other than what you have just pointed out; Canvas Back Point?

A. Between there was a sort of a cut of open water running back still west of that, and lighter marsh, mostly rice and flags, and around that a little rim of open water or ice between that and the shore.

Q. Now, in section 22 describe what land would be found?

A. In section 22 I find approximately as the original field notes show it, Winous Point not having washed away very much, that is, compared with what the other portions had.

Q. How much dry land at Winous Point?

A. I made no calculation as to the area.

Q. State to the court whether or not the greater portion was marsh or land.

A. The greater portion was marsh of different kinds.

Q. Did you notice how Winous Point was connected with the main land?

A. Yes.

Q. State it to the court

A. There was a corduroy road built across what was a swale partly filled in.

Q. State whether or not that swale was partly filled with water or ice.

A. There was ice in it at that time.

Q. Did you find any other land in section 22?

A. Yes, further to the north, the marsh back of the ice, and different vegetation, and approximately high land.

Q. Proceeding into section 21, what did you find?

A. I found in the north part of the section higher marsh, not exactly dry marsh, but above water. And I found what is called Bixler's Point, a long strip or sort of an island running back, but hardly an island because back in parts of this there was very little water over it at that time. It could be waded or walked across. We walked across most any place at that time. And back of that there was a channel, or apparently a channel, with a little more water in, sprinkled with marshes.

Q. Describe what land you found in section 20.

A. Section 20 includes a part, about all, of Horseshoe Island and Horseshoe Bay. Horseshoe Bay was all open at that time, showing very little grass excepting around the edges, and north from that was higher marsh again, and also west of it, along Muddy Creek and towards Muddy Creek.

Q. In section 29?

A. Muddy Creek enters the wider water through section 29, and there is considerable high land in section 29.

Q. Are there any banks to Muddy Creek at that point in section 29?

A. Yes.

Q. Describe the territory in section 28.

A. Section 28, the Sandusky River coming through, and between the river and the waters of Muddy Creek or Muddy Creek Bay was a narrow strip of marshy land; towards the west end there is some land in that.

Q. What streams flow through section 28, if any?

A. The Sandusky River and Green Creek.

Q. Describe what you found in section 27.

A. Section 27, there is a continuation of the neck of land in the north part of 28, which is mostly marsh, and the Sandusky River running in a northeasterly direction through marshy lands, and marshy lands on the east point on the right bend of the river.

Q. What was the condition of the marsh, as to being wet or dry, between the Sandusky River, in section 27, and Mud Creek Bay?

A. There was cane growing in quite a portion of that territory, as I remember it. It generally grows where the land is above water, a part of the time at least.

Q. What islands, if any, did you find in section 27?

A. Squaw Island.

Q. How much of an island was that?

A. There was probably about an acre and a half of high ground in it.

Q. Going east from Squaw Island, what is the next portion of land you found?

A. There is Cape Island and Peach Island. Cape Island is out in the Middle Grounds.

Q. Now proceeding east from Cape Island what was the next land you found in section 26?

A. Well, there is quite a large body of marsh east of that, across Tommy Creek.

Q. Describe to the court the kind of marsh you found there, between Peach Island and Tommy Creek.

A. Between Peach Island and Tommy Creek? Well, that is—I will have to take that from my memory; I simply showed marsh here. If I remember right, there were some ponds where flags and lilies grew, and also patches of reeds—not reed—cane.

Q. Now describe the condition of the marsh east of Tommy Creek.

A. That was similar to that just west of it, though around the shore there was more of a beach—sand bar.

Q. Commencing at Slade's Point describe to the court the meander line of the shore around the waters of Mud Creek Bay as you found it in February, 1894.

A. You want the nature of the shore line?

Q. By giving in detail the directions of it and tracing it all the way around as it is in the record.

A. It would require my book to give you the directions all the way around.

Q. Have you the book with you?

A. Yes. It will be quite tedious to go around there. Well, commencing at Slade's Point—I do not know that I understand yet just what you want.

Q. Commencing at Slade's Point, give the meander shore line as you found it in 1894, in detail, all around Mud Creek Bay, and tell the parts of the sections that you found the different portions of the shore line in.

A. You simply want the directions of the line?

Q. For instance: Beginning at Slade's Point and continuing southwesterly through the southeast portion of section 23 to Long Grass Point.

A. Oh, yes. Well, commencing at Slade's Point the shore line runs in a general southwesterly direction to Long Grass or Canvas Back Point, in the south end of section 23; then the shore line turns back quite sharply in a northeasterly direction to near the northeast corner of section 23, where it again turns back to the southwesterly about a little over half the distance to a line tangent to Long Grass Point; then running west a short distance, and again southwesterly to near the north line of section 23; then the line follows in a general southwesterly direction to the west line of section 23 not far from the north line. Then continuing from section 23 it runs southwesterly to a point about the center of section 22; thence northwesterly to a point near the northwest corner of section 22. Now, of course I am not saying that this is the original shore line. We might branch off. That is the shore line of the main land I suppose then from that point near the southwest corner of section 22; the shore runs southwesterly, westerly, and southwesterly again to a point south of the center of the west line of fractional section 21; then following further west, in section 20, the shore line runs westerly, and southwesterly, and south, or southerly to Muddy Creek, in sections

20 and 29; Muddy Creek outlet is into what is called Horseshoe, which is in section 29; then commencing again at the outlet of Muddy Creek, in section 29, it continues southeasterly through the north part of section 29 to near the northeast corner of section 29; thence it runs easterly in an irregular couse though section 28, to the east line of section 28, at a point about forty or fifty rods south of the northeast corner of section 28, or where the northeast corner would be if it were produced; then running easterly to a point—I forget the name of that point—the Colonel I guess could tell me that, that little cove; then the line turns back to the south and southwest; thence southeasterly and northeasterly, encircling the little cove to a point where the river enters the wide water near Squaw Island; then crossing the river in section 27, the shore turns back to the southwesterly, following the west bank of South Creek, which is at that point quite a wide expanse of water, through sections 27 and 34; then near the center of the west half of section 24 the shore line turns to the easterly to the well defined channel of South Creek; thence continues on in a general easterly direction through sections 34, 35 and 36, to Racoon Bay; thence in an easterly and northerly direction and easterly again, following Coon Creek, to the west line of Sandusky Bay.

By Judge Parker:

Q. That is the description, according to your notion, of the boundaries of Muddy Creek Bay?

A. I do not know that you would call it that. I rather considered it so.

By Mr. True:

Q. I will ask you whether you intended to include the lower marsh as part of the surroundings of Mud Creek Bay?

A. The line I followed, I followed the line of the marsh; that is, where the water stops and the marsh begins, or where the land begins to raise out of the water.

Q. Complete your description by starting east from the point where the Sandusky River meets Squaw Island and then continuing around to *Sandusky Bay*.

A. Then we would have to follow the shore strictly. We would have to come down the west bank of South Creek, and then go up the east bank of South Creek in this direction to Peach Island, and then follow around in a northeasterly direction to Tommy Creek; thence across Tommy Creek, southeasterly to South Point.

Q. In what section is Tommy Creek?

A. 26.

Q. In what part of it?

A. The northeast corner.

Q. Where is South Point?

A. In section 25; the west side of it.

Q. What sections, then, are embraced in the map that you have before you?

A. 20, 21, 22, 23, 24, in Ottawa county and sections 25, 26, 27, 28, 29, 33, 34, 35 and 36, in Sandusky county.

Q. Where is Bixler's Point?

A. In section 21.

Q. In what part?

A. The south part.

Q. In what direction does the marsh and land of Bixler's Point extend?

A. Northeasterly.

Q. To what point?

A. To the land called Winous Point, or upon which Winous Point is located, in section 22.

Q. In what section is Winous Point?

A. 22, and a portion in section 23; that is, the whole land.

Q. And state what the condition of it is as to being a marsh or practically land above water.

A. There is some land; the greater portion is marsh.

Q. Where is Canvas Back Point, in what section?

A. 23.

Q. In what part of it?

A. In the southeast part.

Q. And what kind of land or marsh is it?

A. The extreme point and the east edge of the point is land, dry land.

Q. What is the rest of it?

A. The balance is not so high; it is marsh, although not so very wet.

Q. Where is Slade's Point?

A. Slade's Point is in section 13.

Q. And what part of it?

A. Near the south end of it; not far from the southwest corner of section 13.

Q. What direction from Eagle Island?

A. Northwesterly.

Q. State whether or not that is land or marsh.

A. Slade's Point? That is land.

Q. Where is Eagle Island?

A. Eagle Island is in section 24.

Q. What part of it?

A. It would be in the south part of the section.

Q. State if you know how much land was formerly surveyed out in what is known as Eagle Island.

A. I think it was 124 acres in the island, and twelve acres in the fractional section an the main land.

Q. And how much land did you find there in 1894?

A. About two acres, something like that, on the island, and probably two or three acres on the main land.

Q. Where is Peach Island?

A. In section 26.

Q. What creek do you find east of Peach Island, if any?

A. Tommy Creek.

Q. What is the character of the land between Tommy Creek and Peach Island?

A. Marshy.

Q. And what sections are embraced in the land between Tommy Creek and Peach Island?

A. Section 26, and possibly a part—No, I think not. It is all in 26.

Q. What is the character of the land lying to the east of Tommy Creek, and in what section is it found?

A. It is generally marshy, and is in sections 26 and 25.

Q. What is the point called, the most northeasterly point of this marshy la[illegible]ying east of Tommy Creek?

A. South Point.

Q. What direction is South Point from Eagle Island?

A. West of south; southwesterly.

Q. Where is Cape Island?

A. In section 26, near the line between 26 and 23.

Q. How large is Cape Island?

A. Well, the part that is above water is very small. I do not suppose there is an acre of that hardly.

Q. What is the territory surrounding Cape Island called?

A. It is called the Middle Grounds.

Q. Describe the Middle Grounds as you found it.

A. Well, it is territory with less water covering it than the greater part of the bay. It seems to be mostly shallow water, and quite a vegetation grows there.

Q. Where is Eagle Island marsh?

A. That is directly west of Eagle Island.

Q. And what was it when you saw it?

A. It was covered mostly with cane. The west end of it has some land on it. There is a little tree growing on it if I remember right.

Q. Did you describe where Squaw Island was?

A. Squaw Island is a part of the left bank of the Sandusky River. It was originally a part of the main land.

Q. What did you find separating Squaw Island from the point of land southwesterly from Squaw Island?

A. Water.

Q. How wide?

A. Why, probably 600 or 700 feet.

Q. Now, Mr. DeWitt, how long were you in making this survey?

A. Oh, I was the greater part of the month of February.

Q. State what the stage of water was at the different times you were making this survey?

A. It did not vary very much except at one time. On the 12th of February we had very high water.

Q. I will ask you whether or not you took any soundings on that day?

A. No, sir.

Q. Did you take soundings of all the territory that you have just described?

A. The greater part of it I did.

Q. Beginning now at Slade's Point and going towards Eagle Island, tell the court the depths of water you found?

A. Beginning at Slade's Point I started at two and a half feet. I have only one sounding easterly from Slade's Point. That is about nearly a half mile east. That is six and one-fourth feet.

Q. Now going toward Eagle Island?

A. I found from 2½ feet, 6¼, 8, 5, 4, and 3, out to nothing at Eagle Island.

Q. What depths did you find in the channel running up through there?

A. The deepest sounding I have there is eight feet.

By Judge Parker:

Q. How far apart are these figures, the soundings?

A. I think they are 500 feet. Yes, sir. 500 feet each way.

By Mr. True:

Q. Taking the next range of soundings west of Slade's Point, give that to the court?

A. That started in at 3¼, 6, 6¼, 5¼, 4, 4½, 5½, 5½. These, however, were not regular; the spaces between the last two measurements were double, 1,000 feet.

Q. What soundings did you make in the channel opposite Long Grass Point?

A. I see I have on here four different places I took soundings across the river.

Q. Give these to the court.

A. The deepest is the one furthest east; the one near the section line between sections 23 and 24 is 5 feet on one bank and 6 feet on the other and 12 feet in the center, running

down 8, 9, 10, 12, 5. Then a sounding again across the channel between what is called Nigger Head Island and Canvas Back Point.

By Col. Bartlett:

Q. What distance to the southwesterly?

A. About a thousand feet. I found the banks to have 5 feet of water and the center of the channel 12 feet.

By Mr. Holding:

Q. The banks of the Sandusky River?

A. Yes, sir. Another sounding directly west of Nigger Head Island and west of Nigger Head Point, I presume 1,000 feet from the former. I found the channel much wider, with 6 feet of water on either bank, that is near the bank, I could not say that it was right on the bank, then deepening to 12 feet in the deepest place. I found the north bank of the river more sloping than the south bank at this point, the south bank being quite steep. I have one sounding about a thousand feet west from here, 5 feet on the banks and 12 feet in the center, with a wider bottom but narrower on top. Then northwesterly from Cape Island about a thousand feet I have 5 feet of water on the banks and 8 feet in the channel. That is all the sounding I have across the river.

By Mr. True:

Q. Now give a couple of ranges of soundings between Winous Point, extending east down the bay?

A. Winous Point east commences at 5½, 5¼, 5, 4, 3½, 4, 4½, 5, 5, 5, 5, 3¾, 4¼, 5¼, out south of Eagle Island, 500 feet apart.

Q. Now give the next one south?

A. The next one is about the same, commencing 5¼, then 7, a portion of the river I suppose, 4½, 5, 5¼, 5¼, 5½, 5¼, to south of Nigger Head Island.

Q. Now give the soundings up through the bay in parallel lines 500 feet apart between Winous Point and Bixler's Point?

A. Commencing at Winous Point we have 5½ feet for 4,000 feet, then 5 feet 5½, 5, 4½, 3½, 5½, the balance of the way, except within about 500 feet of Bixler's Point is 4 feet.

Q. Give it a thousand feet south?

A. Two stations south we have starting in 3½ feet, 5¼, 5¾, 6¼, 6¼, 6, 6, 5, 3½, 6, 5¼, 2½ to within about three or four hundred feet of Bixler's Point.

Q. Beginning in Durbin's Bay, and going south, give the depths of the soundings there?

A. About the center of the north end of the bay we have 2 feet, 3, 3½, 4, 5, 6, 3½, 6, 6, 6½, 5½ to within a thousand feet of the south shore.

Q. Now, beginning at a point west from Winous Point and extending to Case's Point, a point southwest of Squaw Island, give the soundings made and the distances apart?

A. It started in at one foot.

Q. How far apart were the soundings?

A. I took them every twenty feet, but could not get them on this scale quite thick enough. They are probably from twenty to fifty feet apart. It started in at nothing out there, one foot, two feet, 3, a little longer there, probably fifty feet apart at this place, 3½, 4, 5, 5½, 6, for about 300 feet, 6¼, 6¼, 6½, 6½ for about 300 feet, then 6 for about 500 feet, 5½ for about 400 feet, 5 for about 400 feet, and 4½ for about 400

or something like that, then 4, 3, 2, 1 and running out at nothing.

Q. I will ask you, Mr. DeWitt, if the figures on that map are all made from actual soundings?

A. Yes, sir.

Q. And by you, and under your direction?

A. Yes, sir.

Q. You may state to the court how you determined the depths of water as you designated them on the map.

A. I did the soundings on the ice. It was staked out with regular stakes and measured one day, taking the line, and sounding every 500 feet.

By Judge Haynes:

Q. You sounded through the ice?

A. Yes, sir.

By Mr. True:

Q. How did you determine the depths of the water? Did you have any standard to go by?

A. Yes, the measurements are reduced to the mean lake level.

Q. Tell the court how you did that.

A. I have the government bench marks for the mean lake level. I have them from Col. Smith and refer them from the bench marks. The mean lake level was taken from the mean stage of Lake Erie from the year 1860 to 1875 I believe it was, taken from the records, the mean standing of the lake.

By Judge Haynes:

Q. Did you cut a hole through the ice and drop a line down?

A. I took a pole.

By Mr. True:

Q. Tell the court how you measured, from the top of the ice or from the water.

A. From the water of course. There would only be about four-tenths of an inch difference anyhow.

By Judge Parker:

Q. And did that stage of the water, according to actual measurements, correspond to the bench marks?

A. There was times when it was low, and times when it was high, but I reduced them in each case to the mean lake level. One day I remember the water stood at zero.

By Mr. True:

Q. What measurements did you make at the time the water stood at zero, do you remember?

A. I do not know that I could tell that.

Q. So that these figures now represent the average?

A. They represent the standing of the water at that time according to the mean lake level.

Q. What was the mean lake level at that time with reference to now, as to being higher or lower?

A. I think higher than it is now generally. I have not noticed for a month or two how the lake is standing, but higher than it has been during the fall.

Q. Did you find an island there west of Middle Island known as Middle Island?

A. Why, there is what we call the stone pile.

Q. How much water is there on that?

A. Part of that is out of water.

Q. How much water is there surrounding that?

A. Oh, there is about three or three and a half feet. I have not that located exactly on the map. The measurements being taken 500 feet apart, I cannot tell exactly.

Q. What depths of water in Horseshoe and Horseshoe Bay? Give one range through there.

A. This range through here would be, starting about 500 feet from the south shore and 400 feet east from the extreme end of Horseshoe Island, 3½, 5½, 4, 2½, 4½, 5, and 3¼.

Q. I will ask you whether or not you have ever sailed over this territory in a sailing boat?

A. Over part of it, yes, sir.

Q. What part of it?

A. I do not know that I could remember now where I did sail. I never sailed over it very much, two or three times, down through this portion of open water, back and forth.

Q. Have you been on these waters during the spring season and early summer?

A. Very little.

Q. You remember being there at one time in 1898, do you?

A. Yes, sir; in the spring of 1898.

Q. Tell the court the condition of these waters when you were there at that time as to being open and free from vegetation.

A. It was open between these main shore lines down through there.

Q. What season of the year?

A. In April.

Q. During the month of February, when you were making that survey, tell the court the condition of that water as to whether it was covered with vegetation or not.

A. The vegetation is shown here by the shading. All other parts were open water.

Q. The parts of the map not shaded were all free from vegetation when you made the survey?

A. Yes, sir; all open on top.

(Adjourned until 9 a. m. of following day.)

Thursday, March 8th, 1900.

By Mr. True:

Q. You stated yesterday that you had a gauge here at Port Clinton by which you could determine the average stage of the water of the lake?

A. Yes, sir.

Q. Tell the court where that is.

A. There is a gauge out on the pier, placed there by the United States engineers, but I use their bench marks that they have around town, by which I have elevations made to save the trouble of going out.

Q. In 1894 did you observe the lowest stage of water and also the highest stages of the water?

A. I am not sure about that, whether it was in 1894 or not. I have taken records of high and low water at different times.

Q. From these records will you tell the court how far the water falls below the ordinary stage at times?

A. Why, I have records of it 5 feet and 5 inches, or 5 feet and 5-10 inches below the mean level, and 5 feet and 4-10 of an inch above the mean level.

Q. Making a difference between the highest and lowest of the addition of these two figures?

A. Ten feet and nine-tenths of an inch.

Q. What is the fact as to the waters in the head of Lake Erie, that is, this end of Lake Erie, having a fluctuation from day to day?

A. They fluctuate. The level depends upon the winds and seasons.

Q. What effect do the easterly winds have upon it?

A. Raises the water.

Q. And westerly winds?

A. Lowers it.

Q. Does that occur practically daily upon these waters?

A. Well, almost daily; not necessarily, but occurs whenever the wind is in a certain direction.

Q. You gave the boundary lines yesterday, what you called the shore lines, of Mud Creek Bay. I wish you would now describe to the court the character of the land and marsh lying north of the north shore line of Mud Creek Bay in sections 23, 22, 21, and 20, and 24 in Ottawa county?

A. Where the north shore line is indicated on that map, at the time I made the survey, the place where the water stopped and the land began, and back of that at various distances it was marshy and low land but above water at that time. The country north of that shore line is flat in most places, with occasional ridges running through it.

Q. And the character of the land back of this marshy land in Bay township, embracing these sections?

A. It was flat, low country, with occasional ridges.

Q. Now, upon the photograph of the map introduced by the plaintiff there are a number of ponds and water indentations north of the point you stated as the shore line. State to the court the facts about these, and how represented on your map?

A. There are some ponds back of what I call the shore line, inland ponds mostly; some have small outlets.

Q. How did you designate them?

A. I designated them as marsh as far as I made any survey.

Q. On the west side or west end of Mud Creek Bay what is the character of the land adjacent to the shore line?

A. Very low in most places.

Q. Marshy?

A. Partly marshy and partly low land without marsh grass growing on it.

Q. What is the condition of the land in sections 29, 28, 27, 26, 25, 36, 35, 34, 33, and 32 in Sandusky county?

A. The greater portion of that territory is marsh lands.

Q. What is the condition of the land south of these marsh lands in Sandusky county?

A. The greater part, for some distance south, is low land, although there are high ridges and points.

Q. Again referring to the photograph of the map, I will ask you to compare the shore line of the photograph of the map with the shore line on your map, and show to the court whether or not they are the same upon both maps, and if not, what difference?

Objected to by plaintiff.

Q. I guess you testified you were a civil engineer?

A. Yes, I think I did.

Cross Examination by Col. Bartlett.

Q. Mr. DeWitt, I understood you to say that you made this survey from which you made the map, in the month of February, 1894?

A. Yes, sir.

Q. What was the time in February that you commenced making your survey?

A. I believe it was the 5th day of February I commenced.

Q. And when did you complete it?

A. Why, about the last week of February; I do not remember the date; in the last week of February, very near the last day; I do not remember the date now.

Q. Did the ice remain over these waters during the entire time you were making this survey?

A. I think not. There was a time of high water that the ice pretty nearly broke up, and there were some days I could not get across on the ice. I think there was some ice during the whole month, but not sufficient to cross.

Q. At such times what portions of the survey did you make when you could not get across?

A. I worked on the meander lines.

Q. I understood you to say yesterday that just previous to your going to make the survey the water had been unusually high, or was unusually high?

A. It was unusually high during the time I was making the survey, between the dates I worked.

Q. This height of water occurred before you commenced making your survey?

A. No, sir.

Q. It was while you were making the survey?

A. Yes, sir.

Q. Did you make any portion of your survey before the rise?

A. I had nearly completed the soundings before the rise of the water, yes, sir.

Q. Were these soundings made upon the ice?

A. Yes, sir.

Q. Then there was ice there before this rise of water?

A. Yes, sir.

Q. Did this rise of water throw the water on top of that ice, or cause the ice to rise with it?

A. In some places the ice rose with the water, but there was water on top of the ice in some places where the ice could not rise with it.

Q. To what extent?

A. I do not know that I could tell, not crossing at that time. A day or two afterwards I crossed and crossed portions of the marsh, and found some places a foot or more water on top of the ice.

Q. Then along the margins you found that the ice had been frozen to the ground, did you?

A. Yes, sir; in places.

Q. In such places the water was over the ice, where the ice did not rise with it?

A. That is a fact.

Q. At that time, I take it, all the summer vegetation there, except the most fibrous portion, which would probably be pond lilies, had been destroyed by the season?

A. Yes, sir.

Q. Now when was it that you made the soundings of the channel there with reference to the time you made your survey?

A. I made the soundings of the Sandusky River channel after I made the survey.

Q. Do you remember about how long after?

A. No, I do not.

Q. Can you approximate about the lapse of time?

A. Why, it strikes me it was some little time afterwards, but I do not remember the dates.

Q. Some little time; several weeks or months?

A. I think it was probably during the month of March.

Q. Were those soundings made through ice or made from a boat?

A. They were made from a boat.

Q. Your first sounding that you made to the east is between what points, please?

A. Between Eagle Island and north or east of Slade's Point, and between Eagle Island and South Point.

Q. Well, taking the north channel of the river, will you designate upon your map there in that locality about the local ity of the channel of the river?

A. Yes, it is north of Nigger Head Island and east of Slade's Point. (Pointing on map.)

Q. How far east of Slade's Point?

A. Not Slade's Point; Long Grass or Canvas Back Point; about a thousand feet east of Canvas Back Point.

Q. And about the same distance north of the little end of land that you call Nigger Head?

A. A little further; probably 1400 or 1500 feet north of Nigger Head.

Q. Is that the extreme easterly cross section of the channel?

A. Yes, sir

Q. What depth of water in the channel?

A. Twelve feet in the deepest portion.

Q. And what did you find upon the birm?

A. Five feet on one side and six on the other.

Q. And the next; there were no measurements made outside of that for the channel?

A. No, sir.

Q. Did you make any observations by which you could determine whether or not the channel extended beyond that point to the eastward?

A. Yes, I knew that it did.

Q. Could you tell, or approximately, the distance that you discovered it to extend to the eastward of that cross sectioning?

A. No, sir; I could not say positively as to that.

Q. I did not expect that you could do it definitely, but approximately?

A. I think it was about a quarter of a mile east I struck the channel of the river in coming across with a boat.

Q. In coming across in the boat, what kind of a boat had you?

A. A row boat. Well, a small lifting boat they call it; a fishing boat.

Q. Was it rowed or poled?

A. Rowed.

Q. By what means did you discover the channel in crossing it below?

A. By sounding.

Q. Is the channel bank quite abrupt wherever you have noticed it?

A. Not what you would call abrupt; it is distinct, but not very abrupt.

Q. Can you approximate about the elevation; what I mean is the angle of elevation?

A. It is flatter than 45 degrees in most places.

Q. And your next sounding was made about how many feet southwesterly from what you described?

A. About a thousand feet southwesterly.

Q. And there what did you determine the depth of the water in the channel, please?

A. Twelve feet in the deepest sounding.

Q. Your next sounding was taken west of what is called Nigger Head?

A. Yes, sir.

Q. Are you able to say whether Nigger Head is called a part of Eagle Island?

A. I have always considered it so, yes, sir.

Q. And there, I understood you to say, you found the channel considerably wider than below?

A. Yes, sir.

Q. Did you discover there that there was a branching channel?

A. Yes, sir.

Q. One running off on the soundings you made and the other running off southeasterly?

A. Yes.

Q. Did you take any measurements to determine the depth of water in the southeasterly channel or south channel?

A. No, sir; not beyond the junction.

Q. Then the next cross sectioning of the channel is about a thousand feet west of the last you have spoken of?

A. Yes, sir.

Q. What did you find the depth of water there?

A. Twelve feet in the deepest portion.

Q. And where was the next cross section, and how far west or westerly of that?

A. It was about— Well, probably something over half a mile.

Q. About 2,500 feet?

A. About that far. Northwesterly from Cape Island and northeasterly from Squaw Island.

Q. Southeasterly from Winous Point?

A. Yes, sir.

Q. It would be nearly on the line between Cape Island and the southeast point of Winous Point?

A. Very nearly, yes.

Q. And what depth did you find there?

A. I found eight feet in the center of the channel.

Q. Did you take any soundings of the channel of the river approximately where Mud Creek Channel strikes the river channel?

A. No, sir; only as this one would be in the vicinity. That is the nearest one I took.

Q. What is the depth of the channel there, or the water in Mud Creek nearest to that last cross sectioning of the Sandusky River channel?

A. Well, I found there three and a half to five and a quarter feet.

Q. What is the greatest depth of the cross sectioning in the channel there?

A. Eight feet.

Q. Did you take any soundings of the river channel west or westerly from that point, southwesterly, or further up stream?

A. No, sir; not Sandusky River.

Q. I presume you made some examinations of the river further up, however?

A. Yes, sir.

Q. And how far out did these examinations extend?

A. Oh, up into the narrow part of the river south of Squaw Island I examined it.

Q. Somewhere opposite the point above Squaw Island, that is, between Mud Creek and the river?

A. Yes, sir; still further up than that I examined it.

Q. Now, from that point out, is it not true that the river is a continuous channel running out and extending down to a point substantially on a line between the east end of Eagle Island and Slade's Point?

A. Yes, sir; I suppose it is continuous. I found nothing to the contrary.

Q. It was continuous?

A. As far as I observed it.

Q. Have you ever been there when there was no ice and no wind, to determine the action of currents, or whether there was a current?

A. Yes, sir; I have observed the currents there.

Q. Is it not true, that unaffected by winds, there is a current coming down from above in these streams, Mud Creek and Sandusky River, carrying off the water coming from the sources and tributaries?

A. Yes, sir; there is.

Q. You found the space between the head of Eagle Island, or Nigger Head, as it is called, to Canvas Back Point, much less, did you not, than the expanse of water further west?

A. Yes, sir.

Q. This expanse of water further west is above the sides of the river channel, are they not?

A. Yes, sir.

Q. They run deeper on the birm of the river channel bank, and out to substantially nothing on the shore on either side, do they not?

A. Yes, sir.

Q. These flats on each side, then, I take it, descend gradually from the shore line to the navigable channel of the river?

A. I think that is true, although there is——

Q. There may be some depressions?

A. There may be some difference but it is generally the case.

Q. So that with the flow of the water in the river drawing it out it would draw the water off the flats into the river?

A. The greater part of it, yes, sir.

Q. That is the substantial or greater part of it. There might be small basins that would hold some small portions of water?

A. Yes, sir.

Q. Now, I would like to understand from you, Mr. DeWitt, the manner and the purpose of this gauging that you have spoken of. I understand you to say that the figures that are placed upon the map do not represent the actual measurements that was made at the time?

A. Not in all cases; no, sir.

Q. But you have atttempted to strike a mean, and made your figures to correspond with that?

A. Yes, sir.

Q. Now, the gauge that you speak of, from which you worked, was here at Port Clinton?

A. Yes, sir.

Q. What is the nearest water connection from the waters of the lake at Port Clinton and the waters of these streams?

A. In distance? Well, the water connection is around Marblehead Point, and is probably about twenty-four or five miles from Port Clinton around to that part of the bay.

Q. Let me know to go by water from Port Clinton to

these waters above you would have to sail out of the lake here to Ottawa city, would you?

A. Yes, sir.

Q. Then you would have to follow the shores along down by East Harbor to Lakeside, down to Marblehead, and there you strike the mouth of Sandusky Bay?

A. Yes, sir.

Q. About what is the distance to the mouth of Sandusky Bay by water from Port Clinton?

A. Well, it is about— It must be— Oh, I suppose fourteen, perhaps fifteen miles; I am not sure.

Q. To the mouth of Sandusky Bay?

A. Yes, sir.

Q. How far is it from here to Ottawa city?

A. About six miles, I think.

Q. Is it not at least ten miles from Ottawa city to the mouth of Sandusky Bay?

A. Possibly; I did not think it was that far.

Q. It is quite a stretch along the lake there?

A. Yes, sir.

Q. Then you have to follow the bay up, passing the drawbridge down here to get into the upper bay, so that from the mouth of the bay to these waters is twenty or more miles, are they not?

A. Yes.

Q. Then you have approximately forty miles of water before you can reach these waters from Port Clinton?

A. Not twenty or more miles in the bay I did not mean; I do not think it is that far in the bay.

Q. What is the distance from the mouth of the river down here at Eagle Island to the drawbridge?

A. That must be about seven miles, I should think.

Q. To the drawbridge?

A. I think so.

Q. Isn't it six miles from there to Plasterbed, and four miles further to the draw?

A. No, sir; I do not think so. It cannot be six miles from there to Plasterbed, because it is all within one township.

Q. I said four from Plasterbed to the drawbridge.

A. Oh, I could soon tell by getting the county map and scaling it. I do not know the exact distance.

Q. What would you say approximately the distance is from the mouth of Sandusky Bay up here to the mouth of the river at Eagle Island?

A. Oh, it is in the neighborhood of twelve or fifteen miles; perhaps more. I do not know. Yes, it is more than——

Q. You do not know that it is eighteen miles from the mouth of the river to Sandusky?

A. I do not know; no, sir. I am simply——

Q. Now, the gauge at Port Clinton was for the purpose of determining and observing the different levels of water in Lake Erie at that point?

A. Well, it is partly that, yes, sir.

Q. What other purpose?

A. It was a gauge established here after observations had been taken for a period of fifteen years and the mean level had been ascertained, and this gauge was fixed, and then of course they took observations from this gauge.

Q. The spacing of the gauge, the zero mark, was at the mean height as determined by observations covering the series of years?

A. Yes, sir.

Q. And then the fluctuations were determined or observed from that zero mark?

A. Yes, sir.

Q. Now, how did you ascertain what deductions or additions to make to the actual measurements that you made over there, for the purpose of determining what the mean elevation of the water was?

A. I observed the stand of water at this place in the lake on a still day when there had been scarcely any wind for two or three days, and then went directly across to the bay and set a gauge in the bay. I assumed, and I think correctly, that the level would be practically the same.

Q. Then if I understand you, you attempted to carry the same level across one mile and a quarter or a half here and establish it on the bay? Did you do that by running a level from here over?

A. I took the stage of water at both points.

Q. Simply took the stage of water?

A. Yes, sir.

Q. The waters in the lake, out here in the open lake, are more readily affected by the winds, are they not, than the waters up here in Mud Creek and Sandusky River regions?

A. Somewhat; yes, sir.

Q. Isn't it true that the drawbridge across here furnishes considerable obstruction to the passage of the water?

A. Yes, it furnishes some obstruction.

Q. Do you know the distance from shore to shore where the bridge is located?

A. I do not recall the distance, no, sir.

Q. Substantially a mile?

A. I think a little over a mile.

Q. And in that distance the bay below spreads out and then contracts to where the bridge crosses?

A. Yes, sir.

Q. And that is the same condition with the upper bay expanding as you get through the bridge?

A. Yes, sir.

Q. In this mile or more expanse how many openings are there in the bridge?

A. I do not know just the number of them.

Q. Well, take them all, what do you think they would aggregate in distance, or do you know the number of them?

A. I do not know the number or length of them.

Q. You have observed enough to know that a very small portion of the distance across the bay is left open to the passage of water?

A. Yes, sir.

Q. Now, that is the effect of retarding the water at the bay bridge preventing the flow through it in consequence, in order to produce a rise above here from the waters coming in below, if you please, independent of the waters of the upper bay, it would require a much greater length of time to raise the waters to the same level that they would be raised by the same winds at Port Clinton.

A. It would take some longer, yes, sir.

Q. And the converse would be true in the water blowing out?

A. Yes, sir.

Q. So that it is true that even a still day may not determine correctly the relative heights of the water in these two localities?

A. If the whole day has been still I am satisfied would be no difference in the level.

Q. If the wind had been blowing so as to move the water considerably one way or the other, one still day would not change it to a mean level, would it?

A. I think so, yes, sir.

Q. You think it would?

A. Yes.

Q. You think a day would furnish sufficient time to run the water back through the draw, or up during the day?

A. In extreme high or low water it probably would not, but an ordinary rise of a few inches or lowering of a few inches would find its level inside of a day.

Q. If it would not do it in extreme high water it would not do it approximately in an ordinary rise or proportionately?

A. Well, of course, it would be more a matter of calculation as to the time it would take, according to the height of the water.

Q. When you took these measurements that you speak of, at that time, did you compare or ascertain what the level was, as determined by the gauge that you had fixed upon the bay shore below?

A. Yes, sir.

Q. Did you frequent that each day, or after you completed the measurements?

A. I had several stakes marked across the bay, and three or four times each day would note the height of the water on one of these stakes.

Q. After the freshet came that you spoke of, that rise of this water to an unusual height, did it freeze again?

A. Yes, sir.

Q. And did the new surface freeze?

A. Yes, sir; that is, where there was water over the ice.

Q. Have you been over here at times when the water, the stage of water, was normal?

A. Yes, sir.

Q. About how much did that freshet raise the water above its ordinary or normal stage?

A. Well, something like five feet.

Q. That froze ice, then, along the shores, and on the shores where that, of course, spread the water over the shores?

A. Yes, sir.

Q. Above where it would be, at an ordinary stage of water, and the ice froze upon that?

A. Yes, sir.

Q. Now, in places that extended back some distance, did it not, from the true shore line at ordinary water stage?

A. Yes, sir; away back in the country a long distance.

Q. What distances would you say?

A. At places probably two miles back from the shore lines as indicated.

Q. Get the mean of it, what would you say?

A. Between a half mile and a mile on an average, perhaps more.

Q. With that ice upon the ground at the time you measured the bay, how did you determine the shore line?

A. Well, the water went down immediately and left shell ice, some places two or three feet above the surface, with no water under it. Ice froze up some places on top of fences and hung there and broke down.

Q. Is it not true that that ice, in falling, obstructed many little depressions and low places in the vicinity of the shore line, so as to prevent the water from escaping again to its natural position inside the shore line?

A. I do not think it did. The ice that froze during the

high water was only about a half inch thick. Simply a shell.

Q. I understood you to say there was ice before that?

A. Yes, sir; but not on the land.

Q. Do you know what the stage of the water was when the first ice was made, or the ice that was there immediately before the freshet?

A. Yes, sir, it was very close to zero; very near the mean level at that time. It did not vary more than about six inches in a week or ten days.

Q. Did not that water keep up above its ordinary stage a number of days after the freshet came?

A. No, sir; not more than about two days.

Q. And the country in this vicinity is a low flat country?

A. Yes, sir.

Q. And the lands as a rule are what are known as swamp lands?

A. The greater portion, yes.

Q. They are within the swamp land district of Ohio, are they not?

A. Yes, sir.

Q. And they are lands that were originally owned by Ohio as swamp lands, having been ceded by the general government to Ohio?

A. They are parts of the swamp lands, that is true.

Q. The majority of the titles to the lands in this immediate vicinity came from the state under the swamp land act, did they not?

Objected to by defendant.

Objection sustained.

Q. I believe you did say they were swamp lands?

A. Yes, sir.

Q. And they lie at that elevation that they are in times of high water flooded to a considerable extent beyond the ordinary shore lines of the water?

A. Yes, sir.

Q. In this territory there are high lands, are there not; that is, comparatively high?

A. There are ridges or knolls.

Q. Do you remember one little island known as Fox's Island, at the mouth of Green Creek?

A. Yes, sir.

Q. The land is high and cultivated, is it not?

A. Part of it, yes, sir.

Q. And Squaw Island is cultivated in part, is it not?

A. Yes, sir.

Q. And Peach Island, some considerable portion of that is cultivated, is it not?

A. It has been, and I suppose it is.

Q. You saw evidences of that fact when you were there, plowed land?

A. Yes, sir.

Q. Did you go in on Graveyard?

A. Yes, I was on Graveyard Island.

Q. It is pretty heavily timbered?

A. Yes, there were some trees of good size.

Q. Quite a dense undergrowth of brush?

A. Yes.

Q. Did you go from what is known as Peach Island over to Graveyard?

A. I think I did, yes, sir.

Q. You could walk clear across, couldn't you, then, without ice?

A. I walked on the ice. I do not know how it would be without ice.

Q. Could you not tell from the levels?

A. I do not think I took any soundings in that vicinity.

Q. Your map seems to indicate a channel there, and I want to know whether you found any channel there?

A. I found the ice above the land where the channel—

Q. You found some ice above, but that ice may have been raised on the ground from the remains of the freshet?

A. No, sir; I think not.

Q. Was there any water under it?

A. I think, if I remember, the ice at that point was frozen solid to the ground, and it was muddy, about a muddy ice.

Q. And it might have been frozen to the ground after it fell, might it not?

A. I would not think so, no, sir.

Q. You do not know?

A. I do not know; no, sir; I could not say.

Q. Well, did you walk from Graveyard down to Coon Creek, the mouth of it?

A. Yes, sir.

Q. Well, did you find any bodies of water there, between Graveyard and Coon Creek?

A. I think there are some small ponds, yes, sir.

Q. Well, that would be lying in south of a line that would intersect Graveyard, wouldn't it, running east and west?

A. Yes, I think it would.

Q. There was a little ridge around there was there not? You remember two trees east of Graveyard on quite a ridge?

A. I remember a ridge around this portion.

Q. A ridge on down to Coon Creek?

A. Yes, sir.

Q. I understood you to say yesterday that Bixler's Point there is not an island, and you now call it an island.

A. Well, it is a question whether you would call it an island or a peninsula. The channel, or expanse of water between, what is shown as water, and the main land, is very shallow and sometimes dry.

Q. Is it not true that it is not covered by water at an ordinary stage of water?

A. I rather think, at an ordinary stage, it would be covered, a narrow strip between.

Q. Over in the northeast?

A. Yes, sir; although I am not positive about that.

Q. Was there anything more than a boatway through it, a little channel that has been made for the purpose to accommodate duck boats to get into the marshes in behind Bixler?

A. Well, that is about what it amounts to; a very narrow channel.

Q. Did you discover some ponds lying in west of Graveyard or in north?

A. North of Graveyard?

Q. Yes.

A. My impression is that there are some.

Q. Did you remember one quite large pond that lies to the right of Tommy Creek?

A. East?

Q. To the left also?

A. Yes, I remember a rice pond I think to the west of Tommy Creek.

Q. Commenced towards the bay?

A. Yes, sir.

Q. Now on the opposite side?

A. On the east side?

Q. West.

A. Well, there is some in there that was wet; I do not know whether there were ponds.

Q. What do you say was the extent by acreage, roughly approximate it, of these two ponds in there?

A. I do not know; the one east of Tommy Creek I suppose had probably ten or fifteen acres in it, I should think. The one west, I do not know the size of it.

Q. The two at least forty acres?

A. It is possible.

Q. Tommy Creek is the outlet of these ponds, is it not? It is the only source of drainage these ponds have?

A. I think that is the only outlet ordinarily, yes, sir.

Q. The land, shore line on the south shore there, from the upper or northwest point of Peach Island down to Tommy Creek, about what is the elevation of the shore line above the ordinary water stage?

A. It runs probably a foot and a half, perhaps two feet in places. Quite a little sand bar the greater part of the way.

Q. Taking it from Tommy Creek around easterly to South Point, what is the elevation of the shore line there above the water at its ordinary stage?

A. Well, I should think practically the same as west of Tommy Creek, except near South Point, I think it is a little higher.

Q. Is it not higher also at the mouth of Tommy Creek, not right on the shore line, but leading a little back from it, a ridge formation?

A. Yes, there is a little ridge running about parallel with the shore for a short distance.

By Judge Parker:

Q. I see you have not located Middle Island on your map.

A. Middle Island at that time was covered with water, except what we call the stone pile.

Q. Is the stone pile a part of Middle Island or part of Long Point?

A. I think it was a part of Middle Island. Perhaps it is a part of Long Point; I am not sure about that.

Q. Was Middle Island altogether covered with water at the time you made these observations?

A. I think so, yes.

Q. And did you ascertain the depth of water right over Middle Island?

A. I am not sure about that. I see I have one measurement three and a half feet of water. I expect probably that was on some portion of Middle Island.

Q. Then your other measurements would indicate a height of water throughout the bay upon the basis of three and a half feet of water over Middle Island?

A. Over the part sounded.

Q. Upon the basis of water over all Middle Island?

A. I am not sure about that. I am not sure whether I sounded on Middle Island or not.

Q. You could not discover any part of Middle Island?

A. I do not remember finding any part of it.

Re-examination by Mr. True.

Q. In comparing your figures, Mr. DeWitt, with the standard here at Port Clinton, what variations did it have on your actual measurements?

A. The greatest variation was one day about six inches.

Q. And what was the average during the entire period of your survey? What difference between the actual measurements and the average standard at Port Clinton?

A. It would not average over two to two and a half inches.

Q. I understood you to say, in making your soundings, that these are 500 feet apart?

A. Yes, sir; the regular ones.

Q. I understood you to say you do not know whether, in making the soundings, you struck a shoal part of Middle Island or not?

A. I am not positive as to that.

Q. Did you notice what was around the shore east of Tommy Creek and west of Tommy Creek, to protect the shore from the action of the water?

A. There was some riprapping, or stone piles.

Q. You spoke of a ridge just south of that. Do you know what caused that ridge, whether or not it is a bar?

A. I suppose it is a bar that was formed by the action of the water at some time.

Q. You were asked by Col. Bartlett if this territory was in what is known as swamp land territory. What part of the swamp land territory did you mean; that back of the shore line or including Mud Creek Bay?

A. Well, I do not know what Col. Bartlett meant.

Q. State whether or not you meant by that—

A. I do not think I answered the question.

Q. You were asked whether or not it was in the swamp land district?

A. I was speaking then of only the low part of the township back, including back into the country some distance.

How far that extended into the bay I do not know without referring to the records.

By Judge Parker:

Q. At the ordinary stage of water, how much of Middle Island is above water?

A. I do not remember finding any of it in the ordinary stage. It is possible that I mixed up what I call the stone pile there with Middle Island. There was a little piece probably as large as this room, with a ridge of stone laid around it to protect it, and partly covered with water on the inside.

Q. Suppose you look at this map and see where Middle Island is located, and tell us whether you find land above water corresponding with that location.

A. Well, I expect perhaps— That is north of the river, I see, and the channel is given here. I expect that is perhaps what I call the stone pile.

Q. You will notice immediately south and west of that some riprapping done, as represented on your map.

A. Yes, sir.

Q. Other witnesses seem to have called that the stone pile.

A. I am not clear about that; could not say positively.

Q. You found the one place where the land or stone was above water?

A. Yes, sir; that is all I remember finding. Perhaps I could find that in my book somewhere.

By Mr. True:

Q. Can you, by referring to your notes, tell whether you found any land at all in that vicinity above water?

A. I was just looking to see if I could find what I call the stone pile. What I called the stone pile was at that point. (Indicating on map.)

Q. That is what is called Long Point, the riprapping on Long Point.

Cross Examination by Col. Bartlett.

Q. Did you take notice of that stone point, stone pile as you call it, did you make any examination for the purpose of determining whether or no that was the point of land that extended from the general shore line, the south shore line, out north?

A. No, sir; I do not remember taking any observations.

Q. And did you take any measurements between that stone pile and the south shore, as you discovered it?

A. Yes, sir; I have them. I do not know that they are right on the line of that, but in that vicinity I have measurements.

Q. What is the depth of water that you found from that stone pile, as you speak of it, south to the shore line?

A. The first measurement is five feet, four and a half; that is all I have between that and the shore.

Q. Have you been there in an ordinary stage of water so as to notice that particular locality?

A. I do not know that I ever noticed that.

Q. Don't you know, as a matter of fact, in an ordinary stage of water, there are a very few inches of water covering the entire distance from the stony point south to the shore line?

A. I am not acquainted with it.

Q. Are you familiar with the location of the county line where it crosses Bixler's Point?

A. I did know at one time where that was.

Q. Are there not some iron stakes to fix the line?

A. I found an iron stake either on Bixler's Point or Horseshoe Island. I think there was on both.

Q. Projecting the county line east from Bixler, how much to the north of that line is this stone pile that you speak of?

A. Well, I have not the exact location of the line at Bixler's Point, but I would think probably the county line would be three or four hundred feet north of the stone pile.

Q. The county line would be north of the stone pile?

A. Yes, sir. It is merely guess work; I do not know.

Q. I wish you would think of that further, and if it is not true that the stone pile is considerably north of the county line?

A. I do not know. It is possible that it is. I have no location of it regarding the county line.

Q. Look on the original map here. I am referring to this point here that runs out. That is Long Point; here is Bixler's Point; here is the county line as I understand it (referring to map)?

A. Yes, sir; I see at that time it ran across the county line.

Q. And what was the measurements that you gave, running from the stone pile south to the shore line, as you have it designated on your plat?

A. Five feet and four and a half are the only two soundings I have.

Q. Now, I understand you to say that you have not observed it in the ordinary stage of water?

A. No, sir; I do not know that I ever took notice.

Q. Did you observe enough to know that there is a line of stone running substantially all the way from the stony point south to your south shore line, as shown on your plat?

A. I do not remember seeing that, no, sir.

Q. The remains of the riprapping at that point?

A. Possibly.

Q. You did not discover that?

A. I do not remember seeing it, no, sir.

And thereupon the defendants to further maintain the issue on their part introduced as witness,

WILLIAM DECKER,

who, being duly sworn and examined, testified as follows:

Direct Examination by Mr. True.

Q. You are one of the defendants in this action?

A. Yes, sir.

Q. What is your business, Mr. Decker?

A. At present wholesale fish buyer.

Q. You may state to the court where you and the other defendants in this case were hauling a seine a short time prior to the 13th day of January, 1894, a short time before you were served with the injunction.

A. We were hauling in what is called Big Cove.

Q. On what side of Mud Creek Bay?

A. On the——

Q. Where were the capstans placed by which you hauled in the seine?

A. Placed in the water.

Q. How deep water?

A. Probably about two feet, I should say.

Q. State whether or not you had a boat with you?

A. We had.

Q. How large was the boat?

A. I should judge about thirty feet.

Q. How wide?

A. About— Well, this boat of French's was about ten feet. I should think; eight or ten feet beam.

Q. And state whether or not this boat was floating in the same locality that these windlasses were stationed?

A. Yes.

Q. And how far from these windlasses were these nets you were hauling, and in what direction?

A. We had a hauling line.

Q. Explain to the court how you haul seines.

A. We had quite a difficult time, I know. We started at one point to run out a line about a thousand feet, and then turn our boat and run to another point, and have a line in our boat and run towards shore, and I remember well our line fell short quite a ways of getting to shore, and we had then to anchor our boat with oars and pull in on our line to get to our capstan. We threw out our capstan in the water, so that we would not have to do any more hauling by hand.

Q. Did you ever fish there before?

A. No, sir.

Q. Nor since?

A. That was my first and last.

Cross Examination by Col. Bartlett.

Q. What was it that caused this difficult time that you speak of?

A. What, of fishing?

Q. You said, you made the remark, while hauling your seine and lines, that you had a difficult time?

A. In getting our line?

Q. What was it made this difficult time you speak of?

A. In getting our lines to the shore

Q. What occasioned it?

A. Well, our lines were too short.

Q. Anything else that created difficulty?

A. Well, as a general thing, they always haul our seine in water—

Q. I am not asking you about general things.

A. Well, that is my first experience; I do not know much about it.

Q. In what way did you have a difficult time in getting your lines ashore?

A. We have to anchor our boat with the oars and pull our seine until we could get it far enough towards shore to reach our capstan, as I have already stated.

Q. If I understand you correctly, you had gone out so far that your lines were not sufficiently long to reach to the capstan at shore, and then you anchored your boats with oars, fastened them, and pulled your seines from the boat up closer to shore, and worked in that way until you got close enough so that your line would work to the capstan?

A. Yes; well, our capstan was in the water.

Q. I do not care where your capstan was. You worked in that way so as to get near, close enough to reach the capstan?

A. Yes.

Q. You claimed, or still claim, the right to fish up here in these waters?

A. Yes.

Q. And in all of these waters up there, don't you?

A. Well, that is in Mud Bay.

Q. You regard Mud Bay the whole distance as shown by those blue lines on that map?

A. Yes, sir.

Q. And you claim the right to fish in all these waters included in these blue lines?

A. I think so.

Re-examination by Mr. True.

Q. You are not very well acquainted with that territory?

A. Do not know a thing about it.

Q. How many times were you up there?

A. Probably four or five times.

And thereupon the defendants to further maintain the issue on their part introduced as witness

JOHN FRENCH,

who, being duly sworn and examined, testified as follows:

Direct Examination by Mr. True.

Q. What is your business, Mr. French?

A. Fishing.

Q. How long have you been engaged in the fishing business?

A. About sixteen years.

Q. And in what localities have you fished during these sixteen years?

A. Sandusky Bay and Mud Creek Bay.

Q. What kinds of nets have you operated in these waters during that period?

A. Pounds, fyke nets, trap nets, gill nets, and seine.

Q. Are you acquainted with the territory that is known as Mud Creek Bay?

A. I am.

Q. How long have you known of it?

A. Over twenty years.

Q. When did you first begin to fish in that locality, Mud Creek Bay, Mr. French?

A. I think it was in 1882.

Q. State to the court what the facts are as to whether or not you and other fishermen fished there without being interrupted for a number of years when you first went there?

Objected to by plaintiff.

Objection overruled. Exception.

A. Up to 1888 I did.

Q. State about how many others were fishing in that locality with you?

A. From twelve to twenty.

Objected to by plaintiff. Exception.

Q. What kinds of nets were you fishing in these waters prior to 1888?

A. The same as mentioned before.

Q. What were they?

A. Pounds, fyke nets,—I did not fish with traps and gill nets. Pounds, fyke nets, and seine.

Q. How much water does it require to set a pound?

A. You cannot set a pound in under eight feet of water or ten feet. Eight feet crib is about as shallow as you make them.

Q. Better explain briefly how a pound is set.

A. The Bense Fish Co. has a photograph of a pound, a fine one.

Q. Describe briefly a pound net?

A. I can draw a diagram on a piece of paper in a minute, so that the court will understand it better.

By Judge Haynes:

Q. A pound net is such that we saw the stakes driven for out here?

A. Yes; a long lead, a set of hearts, a tunnel, and crib. The large ones with a square crib or bag at the end. The fyke you cannot see the crib; the lead and hearts are the same. A fyke net is driven with five less stakes than a pound. It takes five more stakes to hold a crib of a pound up than to set a fyke.

By Mr. True:

Q. And a trap net?

A. Set with four anchors, no stakes.

Q. And does a trap net extend above water?

A. Nothing except the inside end of the lead. We start from shore and run out a flat piece with buoys on top and lead on the bottom. As the water deepens the line goes under as you go out. For probably ten or twelve rods you can see the lead; after that it disappears.

Q. Gill nets are set wholly under water?

A. Not always. You fish a four foot gill net in four feet of water and you can see the top line; in five feet they are submerged.

Q. Have you been on this territory all seasons of the year?

A. Yes.

Q. You have been there continuously during the last sixteen years, each year?

A. Yes, sir.

Q. Beginning at Slade's Point, Mr. French, describe to the court the character of the water between Slade's Point and Canvas Back Point. Describe to the court when vegetation first begins to appear and in what points in Mud Bay. Just step up to the map, and show just the vegetation, the time it comes up, and when it goes down; when it is there and when it is not there?

A. The heaviest vegetation grows on what is known as the Middle Grounds; that is along through here. It begins to come above the surface along in the fore part of June. Along through here it consists of bulrushes, and along the shore margin what is known as deer tongue or arrow head. And down through here the lotus pond lily in the last four or five years has grown very thickly.

Q. What is that locality known as?

A. The Middle Ground. We call it the flats, the fishermen do. Outside of this line of rushes on this channel that runs there is probably twelve, from seven to twelve rods of eel grass or wild celery growth, and across this channel the bulrushes grow along there; a few scattering rushes out through here; all through here is a mud bottom and deep growth of vegetation.

Q. What season of the year does that appear above the surface of the water?

A. The middle of June or fore part of June.

Q. When does it go down?

A. With the frost in the fall.

Q. What is the condition of the same territory at all other seasons of the year?

A. Broad expanse of open water, clear from vegetation.

By Judge Haynes:

Q. Mark on the map and give as near as you can the width of open water.

A. I do not quite understand the court. Outside of this growth of vegetation in summer, do you mean?

Q. There is a body of open water down through here that we are getting at; there has been a controversy about. How large do you think it is in the summer?

A. Oh, from—it is about from here, from in here it is about 3500 feet.

Q. How wide is it from Nigger Head, so-called, and the—

A. There is not any vegetation grows through here, except eel grass, only at he shore margin on either side, along here and there. Eel grass is the only vegetation.

Q. Between Eagle Island and this point down here?

A. The southeast point?

Q. Yes.

A. There is not anything grows there any further out than six rods of the Eagle Island shore; about the same on this side except eel grass; eel grass grows thick.

Q. On the Middle Ground?

A. Outside of this line of rushes there is no vegetation at all.

By Judge Parker:

Q. How much open space is there free from vegetation?

A. 1500 to 2000 feet.

By Judge Haynes:

Q. You may come up into Mud Bay and state the same.

A. There is not anything grows here, except this little

place you were talking about—Middle Island. That is right today, as the water stands today you can get out on top of Middle Island with a pair of hip boots, and nothing grows there except bulrushes and pond lilies any time of the year.

Q. Coming up to the mouth of Mud Creek?

A. No vegetation excepting a line of rushes and deer tongue within ten rods of shore.

Q. And that island?

A. There is a marsh of rushes and deer tongue around the shore margin of the island. This all through here is open water. Can set a gill net here any time of the year. We cannot fish gill nets in grass or weeds.

By Mr. True:

Q. Returning to the Middle Ground, Mr. French, describe the amount of vegetation upon this Middle Ground, and the depths of water at that point.

A. The growth of vegetation on the Middle Ground, there is a bulrush bar follows this channel parallel with the channel.

Q. About how long?

A. From about here to about down here. Probably a thousand feet or maybe more long. On that there is about two and a half feet of water, and nothing grows there but a heavy growth of bulrushes.

By Judge Haynes:

Q. You call it a bar?

A. It is shallow there. Nothing grows except bulrushes there south of this—

By Mr. True:

Q. Describe the territory between Cape Island and Peach Island.

A. That has from four to five feet of water through there, and about this far down all east of it is open water; west it is grown up with these lotus pond lilies, and in near the margin of the shore deer tongue grows very rank, within six or eight rods of shore.

Q. State whether or not there is a channel between Cape Island and Peach Island.

A. Yes, sir.

Q. Navigable?

A. It is.

By Judge Haynes:

Q. You might go further and tell whether you have seen boats go through.

A. Yes, sir. I have gone through myself.

By Mr. True:,

Q. With how large a boat?

A. Thirty-one feet long, nine feet beam to carry four ton. I have caught a good many fish right there. Last spring I made beautiful hauls of carp right there.

Q. That is the same territory Col. Bartlett described as being impenetrable with a boat?

A. I have seen Mr. Brush run through with his steam launch. Mr. George Thompson runs it for him. I have seen her run all through the Middle Grounds, through between Eagle Island, in August.

Q. State whether or not you can sail through all this vegetation described?

A. You can.

Q. State whether or not you can do that with your loads of fish, taking them to market?

A. Yes, sir.

Q. State whether or not you do so?

A. I do.

Q. Describe to the court, Mr. French, what boats you have seen navigating the waters of Mud Creek Bay, from Eagle Island on the east and Horseshoe on the west, and through the territory over which the boats sail and navigate, both by wind and steam?

A. I have seen from a duck boat up to a sixty or seventy-five ton steam barge. I have seen them, the steam boats, the Dessault; she did this riprapping around these shores. She came right up through here, sailed up to this point within twenty-five rods, unloaded the stone from the boat on a lighter, and placed it around there. The same way on this point. The same way all up through here. The same way there. The same way along here. The same way here. I have seen scows sail all over within thirty or forty rods from shore, working out with east wind and working up with west wind.

Q. You have sailed over that territory with a fishing boat?

A. I have sailed over the whole of it. From the east end of Eagle Island I have been clear up through Mud Creek bridge.

Q. State whether you have sailed over Middle Island?

A. Right over the top of it in a northwest squall.

Q. Your boat has a center-board?

A. It has.

Q. How much water does it draw with the center-board?

A. With the center-board up about fourteen inches.

Q. How much with the center-board down?

A. Our center-board is nine feet long, and when the board is down there is about two-thirds of it out of the box. Would draw nearly six feet with the board down.

Q. State how much board you can carry in working up and down Mud Creek Bay?

A. In about all the territory we put the board down and never pay any attention to it. We stand until we get near shore and then come about.

Q. State whether you can work through the rushes?

A. That does not make any difference.

Q. What effect does the shoal portion have on the board?

A. Raises it up in the box.

Q. And in deeper water?

A. The board will drop down.

Q. Where do you take the fish caught up there?

A. We usually bring them to Port Clinton.

Q. How are they hauled down?

A. In boats. We put them in boats and bring them down about a mile and a half from town and they cart them

Q. You haul them down in the sail boats you have been describing?

A. Yes.

Q. How long has this commerce of conveying fish from that territory to market continued, from your knowledge?

Objected to by plaintiff.

Q. State whether or not there is an island above water known as Durbin's Island?

A. No, sir; there is not. There is a pile of stone here in Durbin's Bay. At one time there may have been land above; now there is not. Two or three years ago there was a little flag there; the water was so high it killed the flag; there is no flag growing there now.

Q. There is a channel coming from the Sandusky River leading on down into Sandusky Bay?

A. Yes, sir.

Q. How far below the east end of Eagle Island does this channel extend into Sandusky Bay?

A. Oh, it is—it must be a mile and a quarter where the outside buoy is, the east buoy.

Q. Below the east end?

A. It is nearer Eagle Island.

Q. State whether or not the channel of the Sandusky River, running out in Sandusky Bay, is well defined in the summer months below Eagle Island as it is above Eagle Island, by vegetation.

Objected to by plaintiff.

Objection overruled. Exception.

A. There is. You can trace this channel out as far as the outside bay by the growth of eel grass during the months, the latter part of July, August and September.

Q. What is the condition of the channel in all other seasons of the year?

A. You cannot tell there is a channel there except by the buoys.

Q. With reference to eel grass and wild celery growing in this territory, state to what extent that is found in Sandusky Bay east of Eagle Island?

A. It is found all over Sandusky Bay, even below the bay bridge.

Q. To what extent?

A. As thick as anywhere.

Q. And this is true as to wild celery, both?

A. They are both the same thing.

Q. And what is this eel grass?

A. It is a flat grass; ribbon grass it is commonly known as. It grows to the surface and then spreads out. I have seen it so thick that you could not row a boat through it, but would have to let the oars go alongside the boat through it, crossing to Robinson's dock.

Q. How far from Eagle Island?

A. A mile or a mile and a half

Q. This is the same grass that grows in Mud Creek Bay, the same kind?

A. Yes, sir. In later years it does not grow so thick. Since they got carp in there the carp root it out.

Q. There is not so much as there used to be?

A. Not one quarter as much as there was five years ago.

Q. The description you have given is as it was in 1894?

A. Yes, sir. I have seen it that thick.

Cross Examination by Col. Bartlett.

Q. When did you say you commenced fishing in this territory?

A. In 1882, I think.

Q. And up to what time have you continued to fish there?

A. Until 1888.

Q. Have you fished up in this territory since 1888?

A. Since 1898, I have fished there again.

Q. And up to the close of this last season?

A. Yes, sir.

Q. You spoke of fishing in between Cape Island and Peach Island. Was that last spring?

A. Yes, sir.

Q. And that time, that was before the vegetation had sprung up in that passage there?

A. It was along in June.

Q. Now, isn't it true there is a very dense growth of lotus lily in the water between Cape Island and Peach Island in the season of its growth?

A. No, not there; it is all deer tongue there. The lotus grows on the north side of Cape Island.

Q. Do you pretend to swear that that lotus does not grow between Cape Island and Peach Island?

A. But very little.

Q. Do you know that it is as thick as hair on a dog?

A. I know that it is not.

Q. About how high will that lily grow above the water ordinarily?

A. Oh, about that tall, the stalks that have the—

Q. The stenographer does not know how tall that is?

A. Well, say two and a half feet.

Q. About what are the size of the stalks?

A. Well, equal to a half inch in diameter.

Q. About what size leaf does it support?

A. From two feet in diameter to three feet and a half.

Q. And it supports that above water, the stalk has sufficient strength to support that above water?

A. Only a limited number; others may be lying flat on the water in addition to those that stand up.

Q. There is only one leaf to a stalk?

A. That is all.

Q. That stalk is sufficiently strong and fibrous in its character to support that big leaf suspended in the air?

A. Yes, sir, where they grow—

Q. And that is not killed down so that the stock is killed off below the water by the frost?

A. Oh, yes, the stalk that the leaf grows on goes down on the water after the frost, the stalk that the leaf is on, but the stalk with that big bulb with the seeds in stands up.

Q. The stalk with that cone on with the seeds in is the same stalk that supports the leaf?

A. Oh, no, it is a separate stalk entirely.

Q. There is another one that remains?

A. That usually stands until knocked down by the ice.

Q. And that stalk has a funnel-shaped part on the top of it that contains about how many nuts on an average?

A. Oh, thirty.

Q. And these nuts are of the size of an ordinary sized hazelnut?

A. Materially.

Q. Now, I understand you to say that there is a continuous channel running out into the bay?

A. Where from?

Q. Don't you know what I mean?

A. No, sir.

Q. Have you been talking about the channels running into the bay?

A. We have talked about the channel coming through Mud Bay and out into Sandusky Bay.

Q. And out by Eagle Island?

A. Yes, sir; on the north side of Eagle Island.

Q. Known as the river channel?

A. Known as the channel to get into the river.

Q. You have called it the river channel?

A. Never did in my life and I do not call it that now.

Q. You have taken quite a deep interest in the defense of these fishery interests?

A. That is my occupation.

Q. You have taken a deep interest?

A. Certainly.

Q. A number of years ago the club commenced a suit of this character against you?

A. It did, in 1888.

Q. And there was final injunction restraining you from fishing in these waters?

A. There was.

Q. And yet you continued to fish in them this spring?

Objected to by defendant.

Q. I understand you to say you fished in these waters last spring?

A. I did eighteen months before that.

Q. You have taken a deep interest then, have you not, in favor of the defendants in this action?

A. Why certainly I have.

Q. Now this channel that you spoke of extends to your knowle lge as far as Fremont?

A. No, sir; it does not.

Q. Now, let us see; will you swear that there is not a continuous channel running from Fremont out down through this territory into Sandusky Bay near Eagle Island?

A. I will swear that there is not a channel west of Squaw Island anything like the channel east of Squaw Island.

Q. I am not asking you to compare it. I am asking if there is not a continuous channel?

A. No, sir; there is not.

(Mr. True: He does not understand the question; put the question again.)

Q. We will have no misunderstanding about it. I will inquire of you if there is not a continuous channel from Fre-

mont running down here, running by Squaw Island running across towards Winous Point, and then from there down towards Eagle Island, and running off in a northeasterly direction out into the bay?

A. Mr. Bartlett, I do not call Sandusky River—

Q. Will you answer my question?

A. I do not call Sandusky River—

Q. Will you answer my question?

A. I do not call Sandusky River anything like that channel that Col. Bartlett speaks of. I do not call it a channel. It is Sandusky River itself. There is no channel there.

Q. Now, will you answer my question, if there is not a continuous channel running from Fremont down through this locality I have spoken of?

A. No, sir.

Q. Whereabouts does it cease to exist?

A. It does not commence until it gets to Squaw Island.

Q. There is no channel above Squaw Island?

A. No, sir.

Q. Is there any difference in the depth of the water above and below Squaw Island?

A. There is.

Q. What is the difference?

A. About ten feet or more; at some places twenty feet.

Q. At what points?

A. I can show you on the map.

Q. I do not care how you answer it.

A. Right here at Case's Point. From there across there is twenty feet of water. From Eagle Island across to this flat there is not nine feet of water. We haul seine—

Q. From Eagle Island?

A. From Squaw Island. It is not named; there is a flat goes off into South Creek. There is not nine feet of water there. Right here is where the first government buoy is planted.

Q. Now at that point on Squaw Island there is a bar putting out from Squaw Island, isn't there?

A. The river shows clear across.

Q. Will you answer my question?

A. There is no bar there.

Q. Isn't there a bar putting out from Squaw Island?

A. No, sir.

Q. Is it not on the point of that bar that the buoy is planted?

A. No, sir.

Q. You swear to that?

A. No, sir.

Q. And don't the channel swing around that buoy there, the buoy being placed upon the point of the angle?

A. That is over a hundred rods east of Squaw Island.

Q. I want to call your attention to the map that I have made here by the government. Put your hand there, locating Squaw Island here; that is the locality that I am talking about here.

A. Yes, sir.

Q. I will ask you, outside of this, if there is not a channel running ar[illegible]here? This represents the bar here, but isn't there a channel running around this place here? I will ask you if there is not a channel on the angle?

A. There is not what I call a channel.

Q. You do not call it a channel?

A. No, sir.

Q. Isn't there a bar there on the south or southeasterly side of Squaw Island?

A. No, sir.

Q. And running out from Squaw Island to where the buoy is planted at the edge of the channel?

A. No, sir.

Q. Nothing of that kind?

A. That is Squaw Island shore; it is flat off the shore.

Q. It is not above water?

A. No; it goes off gradually from shore to seven feet. I do not call that a bar.

Q. Outside of that how deep is the water?

A. Eight or nine feet.

Q. It is out in that water, eight or nine feet, where vessels coming to Fremont navigate. They swing around there.

A. They keep in the deepest water.

Q. That is the deepest water they keep in, and swing around there?

A. Certainly.

Q. Is there any other point in which you say there is no continuous channel, where the channel is interrupted, between Fremont and Eagle Island?

A. There is one place; I do not know just how far it is from Fremont, but it is known by the name of Whitacre's Bar, very near Fremont. There is a shallow clear across the river, and had to be dredged there. At one time there was a ford there in the Sandusky River.

Q. Do you know that?

A. That is what the old residents tell me. I know there was not over five feet of water on it when the government sent the dredge there.

Q. That has been kept an open channel?

A. Up there at Whitacre Bar it has; that is the only place.

Q. And that has a channel dredged through, dredging that out?

A. Yes, sir; the government dredged a channel through.

Q. Do you know any other locality in which you say the channel is interrupted?

A. Towards Fremont, did you mean, Colonel?

Q. Anywhere within the limits I have described?

A. No, sir; I do not.

Q. Now this channel that you speak of, after it passes Squaw Island there, going out, it turns almost north doesn't it, for quite a distance?

A. It turns a little west of north, I think.

Q. It may be west by north half west?

A. A little west of north.

Q. In a general northerly direction?

A. Yes.

Q. And that runs out until it makes to the bend about opposite the point of Winous Point?

A. A little south of Winous Point; I think to the eastward.

Q. So that when you are coming in from below, say from Eagle Island and running up that channel in a westerly direction, you have got Winous Point just about dead ahead?

A. Very nearly; a little on the starboard side.

Q. It is substantially in line with the channel?

A. Yes, you might call it that.

Q. At what seasons of the year have you been accustomed to fishing up there?

A. Well, since 1898 I have fished there the year round; the whole year round.

Q. I mean in the using of boats?

A. Oh, on the ice we do not use boats; we cannot.

Q. I understand that, but when you have been hauling seines, and fishing with seines, that way, at what season?

A. All seasons of the year, winter and summer both.

Q. Regardless of the fish law?

A. It is not against the law to catch carp at any time?

Q. I was not asking you about any carp.

Objected to by defendant.

A. I fished there at all times of the year.

Q. Yes, well, outside of your fishing for carp, at what seasons of the year have you fished there?

Objected to by defendant.

Q. Now, is it not true, French, that the time you speak of, in running over these grounds with your boat, was in the spring of the year before the vegetation had grown up?

A. No, sir.

Q. And not marshy then as it is at other times?

A. Just as much in the fall as in the spring; I am there every day.

Q. With what kind of boats?

A. Sail boats, row boats.

Q. What size of boats are you there with every day?

A. From sixteen to thirty-five feet long.

Q. Whereabouts?

A. All over.

Q. All over every day?

A. Nearly.

Q. Upon these grounds every day?

A. Yes, sir.

Q. When?

A. Sometime during the day.

Q. Of what years? Was you last year?

A. Yes

Q. All over it every day?

A. Oh, I was not in every spot, no.

Q. In boats thirty-five feet long?

A. In boats sixteen to thirty-five. Some days in one boat and sometimes in another.

Q. Was it you had a shanty boat in behind Canvas Back Point, and the seine reel out in the water close to shore?

Objected to by defendant.

A. I had a boat anchored in the water on the west side of Canvas Back Point.

Q. It was a shanty boat?

A. Yes, sir.

Q. And a reel staked in the water there, a seine reel?

A. Yes, and gill net reels there.

Q. That was a sweep?

A. Yes, sir, a seine.

Q. Maintained during the season?

A. Yes, sir.

Q. Use it yourself all season?

A. Not myself.

Q. You had men?

A. Part of the time.

Q. Did you have boats up there?

A. Whenever we needed them, yes, sir.

Q. That does not answer my question.

A. They were there by my shanty boat all the time.

Q. These boats that you used up there, what sized boats were they, in connection with your shanty and fishing from it?

A. Well, I had four boats there: One was ten feet long, one sixteen, one eighteen, and the other thirty-one feet.

Q. The thirty-one foot boat you used for transporting whatever fish you might have down to the bay shore road?

A. No, sir.

Q. Did you fish out of it?

A. I fished whenever I fished a seine with that boat.

Q. You did not use it under canvas?

A. Yes, she has a sail in.

Q. Not for fishing?

A. Certainly, we sail up and down; that is what we use it for.

Q. When you are fishing the seine?

A. Not while rowing around.

Q. When hauling seines you do not use canvas?

A. We do not use a boat then.

Q. You use that boat for the purpose of transporting?

A. To go from one hauling ground to another.

Q. The other boats, the other three boats, what was the draft of the largest one?

A. She will carry 2200.

Q. Answer my question.

A. I will give you the draft. When she is loaded she will draw about twenty inches of water.

Q. When light?

A. About eight.

Re-examination by Mr. True.

Q. Give the depths of water, Mr. French, up through Mud Creek Bay?

A. They vary about from four to five feet.

Q. And state to the court the depth, starting from the center of Mud Creek Bay and going to either side, state the variation in depth to the court.

Objected to by plaintiff. Question withdrawn.

And thereupon the defendants to further maintain the issue on their part introduced as a witness,

JOHN PETE,

who, being duly sworn and examined, testified as follows:

Direct Examination by Mr. True.

Q. What is you name?

A. John Pete.

Q. Where do you live?

A. Port Clinton.

Q. I will ask you whether or not you know the territory known as Mud Creek Bay?

A. Yes, sir.

Q. How long have you known it?

A. Since about 1872.

Q. State whether or not you formerly lived in that locality?

A. Yes, sir.

Q. At what place?

A. Bay township, about eight miles southwest of here.

Q. And how near the waters of Mud Creek Bay did you live?

A. We lived within about a mile due east.

By Mr. Holding:

Q. What section?

A. I do not remember. I have not lived up there for a long time. In fact I did not—

By Mr. True:

Q. What business were you priorly engaged in, up there during the summer?

A. Why, I went hunting some, and the last few years up there I went sailing, with the exception of about the last three years, when I worked at the Ottawa club house.

Q. From what point did you sail?

A. Up the creek.

Q. Muddy Creek?

A Yes, sir; about seven miles, down to Sandusky, Marblehead, and Kelly's Island.

Q. What size boat did you sail on?

A. On the kinds formerly called scows.

Q. About how large?

A. Run from about seventy-five feet to about probably sixty.

Q. In length?

A. Yes.

Q. How much beam?

A. From eighteen to about twenty or twenty-two feet, I should think.

Q. How much water would they draw light?

A. Well, I think about probably from sixteen inches; well, some draw less and some more.

Q. And how much loaded?

A. Well, from two feet, six inches to about three and a half feet.

Q. And in what trade were they engaged up there at that time?

A. Why, we carried wood, cord wood, hickory butts, pound poles, and such as that down the bay.

Q. Now state to the court what portions of Mud Creek Bay you sailed over with these scows. Step to the map and explain to the court. Go up Muddy Creek; how far up Muddy Creek would you start?

A. I would go clear up as far as—if you know about where the second bridge is, seven, seven or eight miles.

Q. Above Mud Creek Bay?

A. Yes, sir.

Q. And you sailed mostly all over this water here, backward and forward?

A. We have tacked across there loaded going down in east wind or northeast wind.

Q. How near the shores could you go before you came in stays and came off on the other tack?

A. Some places we would have to stand out further than others. We would generally go within twenty-five or thirty rods, somewhere along there.

Q. Point out to the court how you would work down here with the scows with easterly wind?

A. We would have to tack with head wind. You would have to beat, what we call beat. Lay close to the wind, trim the canvas in close, and tack backward and forward, and we would continue doing that, and of course if the wind and current got too strong, which it does sometimes, we would have to stop and wait until it was so we could get out again.

Q. State whether or not you could do that in all seasons of the year when there was not ice?

A. We could in an ordinary stand of water, yes.

Q. At what season of the year did most of this sailing take place, what months?

A. Well, it did not start out until about April, and lasted

until it froze up in November; owing to the season, how cold it was.

By Judge Haynes:

Q. How many vessels did you keep going?

A. I never owned but two of my own. Of course there were a good many running.

By Mr. True:

Q. About how many?

A. One time I know of there were no less than six or seven, steamboats and sail scows.

Q. How long ago?

A. Well, sir, I have not been in the buisness since 1882. Either 1881 or 1882, I would not be just positive.

Q. Now at the time you were sailing out through there, did you observe fishing nets set in the waters during all that time?

A. Principally the fishing season. They used to have two seasons at that time, in the fall and spring of the year; there would be nets and small pounds set up there.

Q. Did you ever know an island known as Middle Island?

A. The name is not familiar to me, no, sir.

Q. I will ask you whether or not there was any island projecting above water west from a point west of Winous Point?

A. There used to be a little spot, we called it Muscallonge Island; a little vegetation.

Q. Not much above water?

A. There did not seem to be, from what I could see.

Cross Examination by Col. Bartlett.

Q. You have been navigating these waters for the last eighteen years?

A. Since 1882 I have not navigated, no, sir.

Q. And at that time you were engaged in carrying wood and working up and down the creek there?

A. Yes, sir.

Q. Did I understand you to say that at times when the wind became fresh you could not work against it the distance you had to tack, and you came to anchor?

A. Oh, it would be—

Q. And wait until more favorable winds?

A. Yes, sir.

Q. Your aim in going up there was to keep the deepest water, wasn't it?

A. Why, with a fair free wind we always kept as near a straight course as we could.

Q. Your aim, your purpose, always in navigating was to keep the deepest water?

A. Why, certainly.

Q. In doing that, when you had a free wind, and for the purpose of following the channel, when you entered the mouth of it at the Sandusky River, you ran almost a straight course, didn't you, to a point opposite this little point that you gave the name of as some island?

A. Why, when we would strike in the Mud Creek Bay, we would run pretty nearly direct west to this little island we spoke of. Then this Long Grass Point, I think they call it on the south side of the bay, and there we generally went between this little island and the point, what is called Muscallonge Island, I think.

Q. Then your course was northerly by west, bearing west as you worked around?

A. After we got above the club house, yes, sir.

Q. I am speaking about this little island and Long Point. You worked northwest?

A. A very short distance.

Q. You worked off west until you got to the point of Long Point and then rounded that, bearing off to the south and to the west again, and then running westerly again until you came up to the narrow waters and followed the channel. That is correct, is it?

A. Yes, sir.

Q. And these were what were regarded and understood from your exeprience were the deeper waters of these waters?

A. We generally followed what we thought was the deepest, yes, sir.

And thereupon the defendants to further maintain the issue on their part introduced as witness

FELIX COURCHAINE,

who, being duly sworn, testified as follows:

Direct Examination by Mr. True.

Q. What is your name?

A. Felix H. Courchaine

Q. What business are you engaged in?

A. At present?

Q. Formerly?

A. Sailing and fishing.

Q. And how long did you follow the occupation of sailing?

A. About eighteen or nineteen years.

Q. I will ask you whether or not you have sailed vessels on what is known as Mud Creek?

A. I bought one up there at one time.

Q. What size boat was it?

A. Between sixty and seventy feet long, probably eighteen feet beam, drawing three feet and four inches loaded.

Q. How much light?

A. It would draw probably about twelve or fourteen inches.

Q. And what was this vessel used for?

A. Freighting wood, cord wood, hub timber, bolts, before I bought her.

Q. There was a saw mill up there?

A. There used to be a saw mill owned by Mr. Barringer I think at that time.

Q. How far up Mud Creek from Mud Creek Bay would you go with this scow?

A. I never was up there but a very few times with a scow. I have been up there with sail boats a good deal.

Q. How far with sail boats?

A. I have been up to the upper bridge.

Q. Do you know how far that is?

A. Probably seven miles; something of that sort.

Q. From the west end of Mud Creek Bay?

A. From Bixler's Point. I should judge. I could not exactly tell.

Q. State whether or not you sailed that scow yourself through Mud Creek Bay.

A. Yes, sir.

Q. Sailed down through the bay with a head wind?

A. Yes, sir.

Q. State to the court how you would tack that vessel down through Mud Creek Bay.

A. Off and on, from one shore to the other.

Q. Did you always find plenty of water?

A. I used to stand back and forth about for three-quarters of a mile in places. Other places I could not stand so far.

Q. In tacking across up the bay, would you follow any channel or sail straight across?

A. If I had a fair wind I generally took a course straight through. I did not use any channel exactly.

Q. State whether or not it was necessary with a large seventy-five foot scow to follow any channel when the wind was fair.

Objected to by plaintiff.

Q. What kind of a sail boat was this you spoke of, flat or round bottom?

A. A gill netter, round bottom, called the Antelope; drew three feet, a little over, with ballast in light.

Q. State whether or not you saw other vessels sailing through these waters at the time?

A. Oh, yes; my brother sailed one.

Q. Tacking back and forth through the same waters?

A His was a steamer; side wheel boat. Did not have to tack her; she drew five feet loaded.

Q. State whether or not this water was free enough from vegetation during the summer months to take a straight course through Mud Creek Bay with a fair wind?

A. I bought that scow eighteen or nineteen years ago, and sailed her about one season, a little over one season.

Q. When did you sail the sail boat Antelope you spoke of?

A. About four years ago.

Q. Since 1894?

A. Yes.

Q. Go on, Mr. Courchaine, and tell how you navigated this boat since 1894?

A. I have been up Mud Creek as far as the bridge with her, I and my partner, Mr. Slaughterbeck.

Q. And state what you were doing in these waters?

A. Fishing.

Q. What kind of nets?

A. Trap nets.

Cross Examination by Col. Bartlett.

Q. You have been fishing traps as far up as the upper bridge?

A. Between the two bridges.

Q. And near the bridge crossing the—?

A. The Fremont and Port Clinton road.

Q. The drawbridge?

A. Yes, sir.

Q. The other bridge is not a drawbridge?

A. I think not; I never undertook to go through.

Q. What is the distance between the two bridges?

A. That is pretty hard to tell. I should judge somewhere between two and three miles, I should think.

Q. You were fishing with trap nets between these two bridges?

A. Yes, sir; off the lands of some man by the name—I cannot think of his name, an old Frenchman; he gave us the privilege to fish there.

Q. What is the distance from the club house up to the drawbridge?

A. The first drawbridge?

Q. There is but one.

A. That is the drawbridge, the one I know of.

Q. You know the one I mean?

A. I do not know that I could judge, hardly. I should think somewhere about three or four miles, I should think.

Q. And this—what did you say was the name of this boat, this sail boat?

A. Antelope.

Q. And you used that for going up and down?

A. And carrying our nets.

Q. You did not fish with it?

A. We had small lifting boats, sixteen foot lifting boats with her.

Q. Your raising and setting of the nets was done with the small boats?

A. Yes, sir.

Q. And these nets, I take it, were set out as near the channel or center as you could get them?

A. We naturally set them in as deep water as we could find, yes.

Q. The deeper water would be there?

A. In places. We had different depths of nets. Our nets were different depths too. We fished in deep or shallow, as long as we found an opening. We would set out nets anywhere, anywhere we thought there was carp to catch.

Re-examination by Mr. True.

Q. How deep must the water be to operate a trap net?

A. A trap net can be fished in shallower water than a fyke net.

Q. How deep?

A. Three and a half to four feet.

Q. How deep for a fyke net?

A. Four or five feet to make a good success fishing.

Q. And a pound net?

A. Thirty, thirty-five, forty feet, and less along shore.

Q. What is the least water you can operate a pound net in, the least depth?

A. About eight to ten or twelve feet.

Q. What is the least depth of water in which you can operate a seine?

A. Oh, about three feet, three and a half or three feet of water.

Q. State whether or not you can operate a seine among marsh grass?

A. Hardly; not to catch fish.

Q. Col. Bartlett asked you about some bridges at Mud Creek. State whether or not they are both drawbridges?

A. We did not try the upper one, and never noticed.

Cross Examination by Col. Bartlett.

Q. Don't you know that pound nets are used at the head of the bay in four feet of water?

A. They might be.

Q. And less?

A. I do not know. The net part, certainly, the leads, could set from the shore.

Q. Don't you know that leaders are run out from shore and nets set in four feet of water and less?

A. Not to make a success they don't.

Q. They try it, don't they?

A. Not that I know of.

And thereupon the defendants to further maintain the issue on their part introduced as witness

GEORGE WILBUR,

who, being duly sworn and examined, testified as follows:

Direct Examination by Mr. True.

Q. What is your name?

A. George Wilbur.

Q. I will ask you if you are acquainted with the territory known as Mud Creek Bay?

A. Yes, sir.

Q. How long have you known it?

A. About fifteen to eighteen years.

Q. I will ask whether or not you have been in the employ of the Winous Point Shooting Club?

A. I have.

Q. If so, when?

A. Up to within about the last six years.

Q. And what position did you have since that?

A. Well, I kept the Ottawa Club House since that.

Q. State where the Ottawa Club is with reference to the Winous Point Club.

Objected to by plaintiff.

Q. In what capacity were you employed by the Winous Point Club?

A. As game keeper.

Q. Are you acquainted with all territory known as Mud Creek Bay, and the surrounding marshes?

A. Yes, sir.

Q. You may describe to the court the character of what is known as the Middle Grounds.

A. Why, the Middle Grounds is a strip of vegetation that grows out of water; bulrushes and some lily pads.

Q. State whether or not boats navigate right through the rushes growing on the Middle Ground, and whether or not there are open spaces of water between the rushes in this locality?

A. Boats cross more or less. The rushes grow along the whole space nearly; very few rushes some places, hardly any rushes.

Q. In taking a course from Winous Point across to South Point, state whether or not that is the usual course going from Winous Point to Sandusky Bay, with a boat.

A. Why, it is the natural course from the Club House to the southeast point.

Q. Is it the course ordinarily used?

A. By the club employees and club generally.

Q. State whether or not that course goes south or north of the Middle Grounds.

A. It goes south of the Middle Grounds. They would cut across the west end of the Middle Grounds, past Tommy Creek.

Q. Take the map here and show the court. Step there

and point it out on this map and show the course the game keepers and patrolmen take in navigating across there.

A. The course is right down through here. We strike the west end of the Middle Grounds. There is some rushes and lily pads there. We cross through there and follow along the south of the Middle Grounds between the Middle Grounds and shore, and strike across the mouth of Tommy Creek here, and go right around that point. That is traveled more than any place by club employees.

Q. State whether or not it is traveled that way during the season of the year when navigation is at its growth, height and thickness.

A. It is traveled all summer, fall, and spring.

Q. Is that the same territory Col. Bartlett described as impenetrable with a small boat?

Objected to by plaintiff.

Court says need not answer.

Q. State whether or not there is a channel through between Cape Island and Peach Island, running to the eastward?

A. Some times of the year there is a channel, and some times it is grown up rather thick.

Q. Briefly give the court the average depths of water across Mud Creek Bay.

A. I should think about four and a half to five feet on the average. A man could get over his head most anywhere if he gets away from shore any distance.

Cross Examination by Col. Bartlett.

Q. George, what kind of boats do these patrolmen use, that they travel this route that you were talking about?

A. They use skiffs and duck boats.

Q. What is the length of them, about fourteen feet?

A. Sixteen or eighteen feet.

Q. About what is the beam of them?

A. About four feet I should think.

Q. Did you fellows who go down there and patrol use a boat eighteen feet long in patrolling around there, and four feet beam?

A. About sixteen feet long on an average.

Q. They are what is known ordinarily as duck boats?

A. Duck boats and skiffs.

Q. A three board boat, sharp at both ends?

A. Yes, sir.

Q. They draw two or three inches of water?

A. It depends on how they are loaded—

Q. I am speaking—

A. Ask the question again.

Q. You say these are boats that draw two or three inches of water; that is their water line. I am not talking about their loaded water line. I suppose they can be loaded down until the gunwales are nearly to the surface of the water.

A. Ordinarily, yes, sir, they draw two or three inches of water; duck boats will draw three, four, or five inches of water with one man in.

Q. They are often pushed and propelled over less water than they draw?

A. Back in the marsh.

Q. And anywhere where you come in contact with the ground under water?

A. You can shove them over one inch of water.

Q. That is frequently done?

A. Yes, sir.

Q. Frequently in passing over this Middle Ground that you talk about it is necessary for you to push over the ground?

A. Yes, sir, in a blow it is.

Q In places you push over it that way?

A. Only in low water.

Q. At times in getting over. Of course if the water is the average stage of water it is not necessary with duck boats.

A. No, sir.

Q. The kind of boats that you have been speaking of in going across there, are usually rowed, such as a duck boat?

A. And skiffs.

Q. What is a skiff?

A. I always called them skiff. Same shape as a seine boat, only small.

Q. A small row boat?

A. Yes, sir.

Q. How long?

A. From fifteen to eighteen feet long.

Q. And how wide?

A. I should think three or four feet, or four and a half.

Q. Flat bottom?

A. Yes, sir.

Q. Square stern, sharp bow? And drawing probably the same water as a duck boat?

A. They draw more water.

Q. An inch or two added to it?

A. It would depend on how they are loaded.

Q. I am not talking about loaded down. You understand in speaking of the draft of a boat we are not talking about a load line at all. You have handled boats enough to know that. What do the boats draw?

A. A little more than a duck boat; they are of a heavier make.

Q. An inch or two?

A. And there is no surface to support them.

Defendant offers in evidence map in connection with engineer's testimony, and the whole book of record.

Objected to by plaintiff, to offering any more than the plat of these waters.

Court will take whatever pertains to the lands in question.

Defendant also wishes to offer the record in the Bodi case.

Objection by plaintiff.

Court stated would take judicial notice of the record of this court in the Bodi case.

GEORGE WILBUR,

recalled.

Direct Examination by Mr. True.

Q. Mr. Wilbur, do you know a little territory west of Winous Point called Middle Island?

A. Yes, sir.

Q. What depths of water are there on this locality called Middle Island at the ordinary stage of water?

A. I think there is about a foot. I know I used to punt a good deal and we would run in there in September, we would run in the shallowest place and stick our blind up there. There was generally a blind good enough for us.

Cross Examination by Col. Bartlett.

Q. That Middle Island had some flag on, didn't it?

A. No, I think not.

Q. It has this three-cornered grass on, I think?

A. I think it was these reed rushes and very little cane.

Q. That cane does not grow under water, does it?

A. It was under water there. If I recollect right there was a little cane.

Q. Don't you know cane does not grow on ground under water? Only on ground generally above water?

A. As a general thing, yes.

Q. There was quite a considerable vegetation growing on the island, several feet high above the surface in September, wasn't there? In the summer months?

A. Yes, sir.

Q. So that you can run a duck boat in and make a blind; blind yourself by the vegetation that grows there?

A. You can in September.

Q. Later in the fall and winter time there would not be that much water on it, would there?

A. No, I do not think there would.

Q. In the winter time hardly anything on it?

A. In west winds generally a bog sticks out, in November and October.

Q. Don't you know this: Commencing the fore part of September we get high west winds and southwest winds that drive the water out, and that these winds prevail from that time on until winter sets in, and that the stage of water from that time on grows less and less until it is frozen up. Don't you know that?

A. Yes, sir.

Q. And that when it is frozen up it is usually frozen up at its lowest stage, or at a low stage. You know that, don't you?

A. As a general thing, yes.

Q. Now, don't you know, in the winter time when it is frozen up, that there is no water on this island?

A. I never remember seeing any land on that island when there was ice.

Q. Have you ever noticed it with reference to seeing whether or no there was?

A. Yes; I have been on it.

Q. In the winter time?

A. Yes.

Q. Have you noticed no land there then? Didn't you strike the ground when you went on it?

A. There used to be a rat house built out of the rushes.

Q. Rat houses are frequently built on the dry ground, aren't they?

A. Yes, sir.

And thereupon defendants rested their case. And the foregoing testimony was all of the evidence given on the trial and hearing of said action before said court by both parties.

Whereupon the court made its findings of fact and conclusions of law separately, as will appear in the journal entry herein.

Thereupon the plaintiff filed its motion for a new trial on the same day upon which decision was rendered, which was submitted to the court, and upon consideration, the court overruled the same, to which plaintiff duly took exceptions, and judgment was rendered, to which exception was duly taken by the plaintiff, as appears of record in this case.

Whereupon the court gave to the plaintiff fifty days from March 9, 1900, in which to prepare a bill of exceptions. And thereafter, on this the third day of April, 1900, the plaintiff delivered this its bill of exceptions to opposite counsel for examination, and thereafter, on this the 11th day of April,

1900, the plaintiff presented the same to this court and the judges comprising the same, and prayed that the same be allowed, signed and sealed as its true and correct bill of exceptions herein, and that it be made a part of the record by filing, but not recorded. All of which is accordingly done this 11th day of April, 1900.

GEO. R. HAYNES,
ROBERT S. PARKER.

Judges of the Circuit Court of Ohio, Sixth Judicial Circuit.

I hereby acknowledge the receipt of the within bill of exceptions for examination this 3rd day of April, 1900, at 2:30 P. M.

GEO. A. TRUE,
Attorney for Defendants.

IN THE CIRCUIT COURT OF OTTAWA COUNTY.

The State of Ohio, } ss.
Ottawa County. }

The Winous Point Shooting Club,
Plaintiff,

v.

Jeppe Caspersen et al.,
Defendants.

NOTICE TO TAKE DEPOSITIONS.

The defendants will take notice, that on Thursday, the 15th day of February, A.D. 1900, the abovena named plaintiff will take the depositions of sundry witnesses, to be used as evidence on the trial of the above entitled cause, at the office of Goulder, Holding & Masten, 817 Perry-Payne Building, in the city of Cleveland, county of Cuyahoga, and state of Ohio, between the hours of eight o'clock A. M. and six o'clock P. M. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

LOVE & WIERMAN,
GOULDER, HOLDING & MASTEN,
Attorneys for Plaintiff.

I acknowledge service of the above notice, by copy, this 13th day of February, A. D. 1900.

GEO. A. TRUE,
Attorney for Defendants.

It is stipulated and agreed by and between the respective attorneys that the testimony taken under this notice may be used by either party in the cases in which The Winous Point Shooting Club is plaintiff and Henry Carstens, et al., Frank Shepler, et al., William Selmer, et al., Albert Turner, et al., Adam Heller, et al., Peter Dougor, et al., and Jeremiah Brown, et al., are defendants, now pending in this court.

GOULDER, HOLDING & MASTEN,
LOVE & WIERMAN,
Attorneys for Plaintiff.
GEO. A. TRUE,
Attorney for Defendants.

Depositions taken before me, George A. Kaull, a notary public within and for the county of Cuyahoga, in the state of Ohio, pursuant to the annexed notice, at the time and place therein specified, to be read in evidence on behalf of the plaintiff, in an action pending in the circuit court of Ottawa county, Ohio, in which The Winous Point Shooting Club is plaintiff, and Jeppe Caspersen, et al., are defendants.

Present: Mr. S. H. Holding, for plaintiff. No appearance for defendants.

FRANK S. MASTEN,

of lawful age, being by me first duly sworn, as hereinafter certified, deposes and says as follows:

Q. (By Mr. Holding.) You may state your name, age, place of residence and occupation.

A. Frank S. Masten; age, thirty-four; I reside at Cleveland, Ohio, and am an attorney at law.

The further taking of these depositions was there upon adjourned until February 16, 1900, at 9:30 A. M.

February, 16, 1900, 9:30 o'clock A. M.

The further taking of these depositions resumed pursuant to adjournment. Present, same parties as before.

FRANK S. MASTEN (Continued).

Q. (By Mr. Holding.) Can you proceed with the taking of your testimony today?

A. I cannot, at least until late this afternoon; I would prefer that it should be continued until tomorrow.

The further taking of these depositions was thereupon continued till February 17, 1900, 9:30 A. M.

February 17, 1900, 9:30 o'clock A. M.

The further taking of these depositions resumed pursuant to adjournment. Present, the same parties as before.

FRANK S. MASTEN (Continued).

Q. (By Mr. Holding:) Do you know the general direction in which the Sandusky River runs through the property of The Winous Point Shooting Club?

A. Not definitely, no.

The further taking of these depositions was adjourned until February 19, 1900, at 9:30 o'clock A. M.

February 19, 1900, 9:30 o'clock A. M.

The further taking of these depositions resumed pursuant to adjournment. Present, the same parties as before.

FRANK S. MASTEN (Continued).

Q. (By Mr. Holding:) How long have you lived in the state of Ohio?

A. All my life.

FRANK S. MASTEN.

The further taking of these depositions was thereupon adjourned until February 20, 1900, at 9:30 o'clock A. M.

February 20, 1900, 9:30 o'clock A. M.

The further taking of these depositions was resumed pursuant to adjournment. Present, the same parties as before.

Also,

GEORGE B. MARTY,

of lawful age, being by me first duly sworn, as hereinafter certified, deposes and says as follows:

Q. (By Mr. Holding:) What is your name?

A. George B. Marty.

Q. Where do you live?

A. Cleveland, Ohio.

The futher taking of these depositions was thereupon adjourned until February 21, 1900, at 9:30 o'clock.

February 21, 1900, 9:30 o'clock A. M.

The further taking of these depositions resumed pursuant to adjournment. Present, the same parties as before.

GEORGE B. MARTY (Continued).

Q. (By Mr. Holding:) How long have you lived in Ohio?

A. Sixteen years.

The further taking of these depositions was thereupon adjourned until February 22, 1900, at 9:30 o'clock A. M.

February 22, 1900, 9:30 o'clock A. M.

The taking of these depositions resumed pursuant to adjournment. Present, the same parties as before.

GEORGE B. MARTY (Continued).

Q. (By Mr. Holding:) Do you know the general direction in which the Sandusky River runs through the property of The Winous Point Shooting Club?

A. No, I don't.

The further taking of these depositions was thereupon adjourned until February 23, 1900, at 9:30 o'clock A. M.

February 23, 1900, 9:30 A. M.

The taking of these depositions resumed pursuant to adjournment. Present, the same parties as before.

GEO. B. MARTY (Continued).

Q. (By Mr. Holding:) Have you been on the grounds of The Winous Point Shooting Club since September, 1898?

A. I have not.

GEO. B. MARTY.

The further taking of these depositions was thereupon adjourned until February 24, 1900, at 9:00 o'clock A. M.

February 24, 1900, 9 o'clock A. M.

The further taking of these depositions resumed pursuant to adjournment. Present, same parties as before.

COL. JARED A. SMITH,

of lawful age, being by me first duly sworn as hereinafter certified, deposes and says as follows:

Q. (By Mr. Holding:) Give your name and place of residence?

A. Jared A. Smith; residence, Cleveland, Ohio.

Q. What is your occupation?

A. That of civil and military engineer in the United States.

Q. Where are you stationed now and over what territory?

A. I might say with rank of Colonel in the Corps of Engineers, U. S. Army, my present station being Cleveland, Ohio.

Q. And over what territory do you have supervision?

A. Over all works of improvement on Lake Erie between the mouth of the Detriot River and Erie, Pa.

Q. You may state how long you have been stationed at Cleveland with the authority which you have already stated?

A. Since eight years ago in December last.

Q. During that time has the government made any improvements of the Sandusky River?

A. The government has improved the Sandusky River at the mouth by dredging a channel through the bar in 1893.

Q. Have you personal acquaintance with the Sandusky River or any portion of it?

A. I have been entirely over the river between Fremont and the bay on several occasions, and during the time the improvements were in progress I visited the works then in progress several times.

Q. Do you know where Eagle Island is located?

A. Yes, I do. It is immediately adjacent to the mouth of the river.

Q. You may state whether the government has located the channel of the river?

A. There has been a survey made for the government covering the entire length of the river between Fremont and Upper Sandusky Bay for the purpose of locating the channel and ascertaining its necessities in the way of improvement.

Q. You may state whether any map of the survey was made by the government of the United States?

A. There was a map made under the direction of General T. J. Cram, in October, 1866, by requirement of congress. This map is on file in my office and is one of the government records.

Q. You may state whether or not the tracing which you hold in your hand marked "Plaintiff's Exhibit A" for identification, is a copy thereof?

A. The map I hold in my hand is a carefully made tracing from the map now in my office. This tracing was made by a draughtsman in my office under my personal supervision. It has been compared with the original by me and I have certified thereon that it is a true copy, and the certificate bears my signature.

Q. You may state what these figrues are in what is shown to be the channel of the river, what they indicate?

A. They indicate depths of water in feet as referred to the plane of the mean level of the lake surface.

Q. You may state whether or not there was any bar at the mouth of the Sandusky River at the time you have stated the dredging was done for the purpose of improving the river?

A. There was a bar at the mouth of the river commencing at a point nearly opposite the middle of Eagle Island, and extending in a northeasterly direction a short distance into Sandusky Bay.

Q. What is the fact as to there being a well defined channel of the river from Fremont to its mouth?

A. The river has a well defined channel through its entire length from its mouth to Fremont.

Q. By the "channel," what portion of the river do you allude to?

A. I allude to the channel of deepest water at which the greater portion of the outflow of the river passes, and which goes to the northward of Eagle Island.

Q. How did you ascertain where the mouth of the Sandusky River was?

A. The mouth of the river had been determined before my being in charge of the works in this district, as the result of surveys which had been previously made, these surveys showing where the distinct channel of the river was merged with the waters of upper Sandusky Bay.

Q. From your observation and examination where did you find the mouth of the Sandusky River to be, irrespective of the maps on file in your office, as you have stated?

A. I should say that the mouth of the river is ordinarily defined by the line of headlands or islands immediately adjacent to the channel; or, in other words, at the point where the waters of a stream unmistakably broaden into the open waters of a bay or sea. So far as it can be defined by a single line, I find that line to be a line drawn tangent to Eagle Island on

the east or northeast side, as shown upon the map, and tangent to the small headlands on the opposite side of the channel. This would make the line described nearly perpendicular to the line of channel at that place.

Q. You may state whether you found a bar at or near the vicinity of what you have stated to be the mouth of the Sandusky River?

A. I did find such a bar.

Q. You may state in what direction if at all this bar extended?

A. This bar commenced somewhat above the line indicated at the mouth of the river, that is commenced in the channel part of the river, and extended across the channel outward into the Sandusky Bay.

Q. What was the shape of the bar that you found in Sandusky Bay?

A. The bar spreads outward from the mouth of the river into the bay in a shape not unlike an open fan, radiating from the river into the waters of the bay.

Q. You may state whether or not the Sandusky River had any other channel than the one you stated to be north of Eagle Island?

A. There is a space of open water south of the island connecting the channel of the river with the waters of the bay, and in that sense it would be a second channel or mouth of the river. The water, however, was so much more shallow that the more northerly channel was taken as the channel of the river, and the one which would be most easily improved and maintained.

Q. Where did you find the mouth of the river to be in the southerly channel to which you have just referred?

A. I really had no occasion to make observations with

reference to the exact mouth of the southerly channel, because there would be no purpose in doing so at that time, as for all practical purposes it was not considered the channel mouth of the river. Were it necessary, however, it would be determined by the same principles as those applied in determining the mouth of the main channel.

Q. You may state in what manner and from what cause bars are formed at the mouths of rivers?

A. At the mouths of silt bearing streams, and of streams whose velocity is sufficiently great to roll particles of sand or other matter along the bottom, the principal cause of the formation of bars at the mouth is because the silt or other matters which has been pushed along reaches a point where the velocity of the stream becomes smaller, or is destroyed entirely by meeting with a larger body of water. The motion of the particles of silt and sand is then stopped, and the material accumulates in a bar. These conditions are necessarily modified by the conditions of the waters into which this stream discharges. In many places in large bodies of water as on Lake Erie, bars are formed at the mouth of streams through the wave action upon the lake which drives the sand upon the shore and leaves it in ridges across the mouth of the stream.

Q. Are you able to state what caused the formation of the bar which you have described as being at the mouth of Sandusky River and extending out into Sandusky Bay?

A. The material dredged from this bar was of a soft dirty brownish mud, indicating unmistakably that most of it had been brought down the stream and then deposited at and near the mouth of the stream because of the reduction in current velocity.

Q. You may state more fully as to the character of the

material that was dredged out of this bar at the mouth of the river as you have stated?

A. The greater portion of the material dredged, when dropped from the dredge bucket into the scow, was very soft; and in falling would freely spatter over a considerable distance. So far as could be judged, without stopping to analyze it, it consisted mainly of half decayed vegetable matter mixed with some loam such as would naturally fall into the river from the erosion of its banks, and would fall into it as a part of the drainage of a town or city, of the dead leaves and other vegetable matter which would fall into the stream from small courses running through the adjacent woods and marshes. Underneath this deposit the bottom was found to be hard, as it has been found in other parts of Sandusky Bay.

JARED A. SMITH.

Plaintiff's Exhibit Dd. (E. G.)

Further to maintain the issue upon its part, the plaintiff introduced as a witness,

CHARLES C. BOLTON,

of lawful age, who, being by me first duly sworn, as hereinafter certified, deposes and says as follows:

By Mr. Holding:

Q. State your name, age, residence and business.

A. Charles C. Bolton; age, forty-four; residence, Cleveland; business, mining, manufacturing, and selling pig-iron, iron ore and coal.

Q. Are you familiar with the lands and waters claimed to be owned and controlled by the Winous Point Shooting Club?

A. Yes, sir, I am.

Q. Are you familiar with the location of the Sandusky River and the place where it empties into Sandusky Bay?

A. Yes, sir.

Q. Are you familiar with the waters and islands, and marshes in sections 15, 16, 20, 21, 22, 23 and 24 in Bay township, Ottawa county, Ohio?

A. Yes, I am.

Q. Are you familiar with the lands, waters and marshes in sections 25, 26, 27, 28, 29, 33, 34 and 35 in Riley township, Sandusky county, Ohio?

A. Thirty-three— I don't know so much about that country up in there, section 33; but omitting 33, I am familiar with all the rest of them.

Q. How long have you been familiar with all of this territory mentioned?

A. More or less so for twenty years.

Q. You may state if, at any time, you took photographs of any part of these marshes, lands or waters in any of the sections mentioned heretofore?

A. I have.

Q. When did you take these photographs?

A. In the summer of 1899, the early part of August.

Q. I hand you photograph marked "Plaintiff's Exhibit B," state when it was taken, and what portion of the land, marshes or waters it represents.

A. It was taken by me in August, 1899; and represents the so-called Middle Ground, looking east. It was taken from a boat in which I was, in the Sandusky River between what is known as Peach and Squaw Islands, in section 26, Sandusky county, Ohio.

Q. You may state whether or not this photograph, Exhibit B, is a correct and accurate representation of that part of the Middle Ground included in the picture?

A. Yes, it is.

Q. You may state whether or not it is a correct and accurate representation of that locality as it has been at that season of the year since you have known it.

A. It is.

Q. Where, if at all, is the Sandusky River represented upon this photograph?

A. It is represented in the foreground of the photograph.

Q. What was the dark matter represented beyond the river, in the photograph?

A. That is the aquatic vegetation which was growing at that time.

Q. You may state how this vegetation in August, 1899, compared with the vegetation at that point since you have been acquainted with the locality.

A. It was about the same every year.

Q. I show you "Plaintiff's Exhibit C," and you may state who took that photograph?

A. I did.

Q. Where were you when you took the photograph?

A. I was in a boat in the Sandusky River, between Peach and Squaw Islands.

Q. In what direction were you looking?

A. North, northeast, toward what is known as the Middle Ground.

Q. You may state what water it is in the foreground of the picture?

A. Sandusky River.

Q. What is the dark stuff shown upon the picture?

A. Aquatic vegetation.

Q. What is that which is represented by a white line beyond the aquatic vegetation, as shown in the picture?

A. The Sandusky River north of the Middle Ground.

Q. In what section, if you know, was this Middle Ground, as shown in this picture?

A. Section 26, Sandusky county, and section 23, Ottawa county, and some of the land and waters to the northward of it, are also shown.

Q. You may state whether or not this picture is a correct and accurate representation of the waters and lands at that point, as they were in August, 1899?

A. It is.

Q. You may state whether or not the lands and waters in that vicinity covered by the picture, were the same or otherwise at that season of the year, since you have been familiar with the locality?

A. Practically the same.

Q. I hand you "Plaintiff's Exhibit D," and you may state who took that picture?

A. I did.

Q. When?

A. I took all of these pictures in August, 1899.

Q. State where you were when that picture was taken?

A. In a boat in the main channel of the Sandusky River, just a little south of what is known as Canvas Back Point, in section 23.

Q. In which direction were you looking?

A. South southwest.

Q. What is the water in the foreground of the picture?

A. The main channel of the Sandusky River.

Q. By the main channel, what do you mean?

A. The navigable channel; the channel that is navigable by boats going up and down the river.

Q. What does that represent which shows dark, immediately beyond the river?

A. It is the aquatic vegetation of the Middle Ground, just south southwest from Canvas Back Point.

Q. Where are the trees in the distance, as represented on the photograph?

A. They are on Squaw Island.

Q. You may state whether or not this is a correct and accurate representation of the vicinity at that time?

A. It is.

Q. You may state whether or not it is a correct and accurate representation of the location at that season of the year, since you have known it?

A. It is.

Q. I show you "Plaintiff's Exhibit E," and you may state who took that photograph?

A. I did.

Q. Where were you when you took it?

A. I was in a boat on the edge of the Sandusky River, in section 23, about south or a little to the east of south of Canvas Back Point, and south of the main channel of the river.

Q. In which direction were you looking?

A. I was looking west.

Q. Where is the vegetation as shown upon the picture?

A. That is in what is known as the Middle Ground.

Q. Where are the trees shown on the left of the picture?

A. On Squaw Island.

Q. Where are the trees shown on the right of the picture?

A. On Winous Point.

Q. You may state whether or not that is a correct and accurate representation of the locality as it was upon the day you took the picture.

A. It is.

Q. You may state whether or not it is a correct and accurate representation of the locality and the vegetation in the locality at that season of the year, since you have known it.

A. It is.

Q. I show you "Plaintiff's Exhibit F," you may state who took that picture?

A. I did.

Q. Where were you when it was taken?

A. I was in a boat, in what is known as the Middle Ground.

Q. In which direction were you looking?

A. Looking west.

Q. In which section were you?

A. I was in either the northeast quarter of section 26, or the southeast quarter of section 23; I will not be positive which.

Q. Where is the vegetation which is shown in the picture?

A. In the Middle Ground.

Q. Where are the trees as shown on the left of the picture?

A. Squaw Island.

Q. And on the right of the picture?

A. Winous Point.

Q. You may state whether or not that is a correct and accurate representation of the vicinity as it was at the time you took the picture.

A. It is.

Q. You may state whether or not it is a correct and ac-

curate representation of that vicinity since you have known it, at that season of the year?

A. Yes.

Q. I show you "Plaintiff's Exhibit G." You may state who took that photograph.

A. I did.

Q. Where were you when you took it?

A. I was in a boat in the Sandusky River, at the east end of what is known as Squaw Island, in section 26, Sandusky county.

Q. In which direction were you looking?

A. I was looking northwest.

Q. What is the water that is shown in the foreground?

A. The main channel of the Sandusky River.

Q. What is the vegetation which is just beyond?

A. The northeast end of Squaw Island.

Q. What are the trees beyond?

A. Trees on Winous Point and around the club house. The white club house is also shown in the picture.

Q. You may state whether or not that is a correct and accurate representation of the locality as it was at the time you took the picture.

A. It is.

Q. State whether or not that is a correct and accurate representation of the locality as it was at that season of the year since you have known it?

A. I would say yes.

Q. Showing you "Plaintiff's Exhibit H," you may state who took the picture?

A. I did.

Q. Where were you when it was taken?

A. I was on what is known as Nigger Head, which is the west end of Eagle Island.

Q. In which way were you looking?

A. Northwest, toward Canvas Back Point.

Q. Where are the trees as shown upon the picture and on the left of it?

A. Canvas Back Point.

Q. What is the stream of water running between the aquatic vegetation and the trees?

A. The main channel of the Sandusky River.

Q. You may state whether or not this is a correct and accurate representation of the locality as it was at the time you took the picture.

A. It is.

Q. What do you say as to whether or not it is a correct representation of the locality as it has been at that season of the year since you have known it.

A. It is.

Q. I show you "Plaintiff's Exhibit I," you may state who took that picture.

A. I did.

Q. Where were you when it was taken?

A. I was on what is called Nigger Head, at the same place from which I took the picture known as "Plaintiff's Exhibit H."

Q. Which way were you looking when this "Exhibit I" was taken?

A. I was looking north by east, toward Slade's Point.

Q. Where is Slade's Point shown on the photograph, if at all?

A. It is shown in the centre of the picure in the distance, by the trees there.

Q. You may state whether or not that is a correct and accurate representation of the locality as it was at the time you took the picture?

A. It is.

Q. State whether or not that is a correct and accurate representation of the locality as it has been since you have known it, at that season of the year?

A. It is.

Q. What does the heavy black shading of the picture to the right of it, represent?

A. Vegetation that grows between Nigger Head and Sandusky Bay, and between the main channel of the Sandusky River and Eagle Island.

Q. You may state who took the picture marked "Plaintiff's Exhibit J," which I now show you?

A. I did.

Q. Where were you when you took it?

A. I was in a boat in the main channel of the Sandusky River, about the west line of section 24.

Q. In which direction were you looking?

A. Looking east.

Q. What is the water shown in the foreground?

A. It is the main channel of the Sandusky River.

Q. What is the dark shading shown beyond the water?

A. The aquatic vegetation.

Q. What does the still darker shading beyond that, represent?

A. It represents Eagle Island, and the trees which are located on it.

Q. What portion of Eagle Island?

A. Eagle Island is separated by a cut, and it represents the eastern part of Eagle Island, lying just west of Sandusky Bay.

Q. You may state whether or not that is an accurate representation of the locality as it was at the time you took the picture?

A. It is.

Q. State whether or not it is an accurate representation of the locality as it has been since you have known it, at that season of the year?

A. It is.

Q. I show you "Plaintiff's Exhibit K," and ask you who took that picture?

A. I did.

Q. Where were you when you took it?

A. I was in a boat in Sandusky Bay, about a quarter of a mile east of Eagle Island.

Q. Where is the vegetation which is shown beyond the waters that are shown in the foreground of the picture?

A. It is the vegetation which is at the extreme east end of Eagle Island. The trees beyond are on the island.

Q. You may state whether or not that is a correct and accurate representation of the locality as it was at the time you took the picture?

A. It is.

Q. You may state whether or not that is a correct and accurate representation of the locality as it has been since you have known it, at that season of the year?

A. It is.

Q. I show you "Plaintiff's Exhibit L," and ask you who took that picture?

A. I did.

Q. Where were you when you took it?

A. I was in a boat, a little to the north of the main channel of the Sandusky River, and about at a point where the east and west line of section 24 crosses the main channel.

Q. In which direction were you looking?

A. East northeast.

Q. What is the upright post which is shown on the picture at the right of the picture?

A. That is the government buoy on the east side of the channel of the river.

Q. What is the dark stuff which is shown on the left of the picture?

A. Well, the very dark stuff is the ranker aquatic vegetation; that apparently lying in the water is aquatic vegetation known as wild celery.

Q. Where is the channel of the Sandusky River shown on the picture, if at all?

A. The channel of the Sandusky River is shown upon the picture where there is no evidence of aquatic vegetation, and where the water seems to be free from it just to the left of the government stakes.

Q. What is the vegetation beyond the stake?

A. That is the ranker vegetation which grows between the channel of the river and Sandusky Bay, to the north of Eagle Island.

Q. What do you say as to whether or not this is a correct and accurate representation of the locality as it was at the time you took the picture?

A. It is.

Q. What do you say as to whether or not it is a correct and accurate representation of that locality as it has been at that season of the year since you have known it?

A. It is.

Q. I show you "Plaintiff's Exhibit M," who took that picture?

A. I did.

Q. State where you were when it was taken?

A. It was taken from a boat just south of the main channel of the Sandusky River, in section 24, between Slade's Point and the east part of Eagle Island.

Q. You may state what place this is in the picture, upon which trees are growing?

A. That is the east part of Eagle Island, east of Eagle Island cut.

Q. You may state whether or not this is a correct and accurate representation of the locality as it was at the time you took the picture?

A. Yes.

Q. State whether or not it is a correct and accerate representation of the locality as it has been at that season of the year since you have known it?

A. It is.

Q. I show you "Plaintiff's Exhibit N," you may state who took that picture?

A. I did.

Q. Where were you when it was taken?

A. I was on the east side of the main channel of the Sandusky River, between it and Peach Island where the river turns and runs almost due north.

Q. In which way were you looking?

A. Looking north.

Q. What are the stakes shown in the picture?

A. They are the government stakes defining the navigable channel of the river.

Q. Where is the aquatic vegetation shown in the foreground of the picture?

A. That was between the point where I was to the west of Peach Island, and the main channel of the Sandusky River,

Q. What is the vegetation as shown on the left of the picture?

A. It is the northeast end of Squaw Island.

Q. What is the vegetation shown upon the right of the picture, just beyond the stake?

A. It is the west end of what is known as the Middle Ground.

Q. What is the white streak shown beyond that?

A. That is the Sandusky River after it turns to go to the eastward.

Q. You may state whether or not this is a correct and accurate representation of the locality as it was on the day you took the picture?

A. It is.

Q. State whether or not that is a correct and accurate representation of the locality as it has been since you have known it, at that season of the year?

A. It is.

Q. I show you "Plaintiff's Exhibit O," who took that picture?

A. I did.

Q. Where were you when it was taken?

A. I was in a boat in the main channel of the Sandusky River where it runs to the northward, and at a point about opposite and to the south and west of Cape Island.

Q. Which way were you looking?

A. I was looking northeast.

Q. What is the aquatic vegetation which is shown in the foreground of the picture and just beyond?

A. It is aquatic vegetation that grows just at the edge of the river, and that further in the distance is that which grows on what is called the Middle Ground.

Q. What is the black streak in the centre of the picture, beyond that which you have just described?

A. It is more dense vegetation growing on Cape Island.

Q. State whether or not this is a correct and accurate representation of the locality as it was on the day when you took it?

A. It is.

Q. State whether or not it is a correct and accurate representation of the locality at that season of the year as it has been since you have known it?

A. It is.

Q. You may state at what season of the year the vegetation shown in this picture is of the same character and density?

A. From the middle of July until the frost comes.

Q. Are you familiar with the waters running through these sections I have already mentioned, which are navigated by vessels carrying commerce?

A. Yes, I am.

Q. What familiarity have you?

A. I have the familiarity which comes from being at the club house six, or eight, or ten times a year during the season of navigation, and remaining there anywhere from two days to ten days at a time.

Q. State what waters in those sections which I have mentioned, have been navigated by vessels engaged in trade or commerce.

A. The only waters I have ever seen navigated have been those of what is known as the main channel of the Sandusky River, where the government has placed its stakes or buoys.

CHARLES C. BOLTON.

Plaintiff's Exhibit "Ee." (E. G.)

[Duly Certified.]

IN THE COURT OF COMMON PLEAS OF OTTAWA COUNTY, OHIO.

The Winous Point Shooting Club,
Plaintiff,
v.
Jeppe Caspersen, Peter Petersen, Wm. Decker and Chas. Petersen,
Defendants.

ANSWER.

[Filed March 30, 1894.]

The defendants for their answer herein deny that plaintiff is the owner, or is in possession of the premises described in its said petition.

Defendants deny that they claim any estate or interest in the said premises adverse to the plaintiff's rights, except as such rights as the members of plaintiff and defendants mutually have with the public generally, viz.: the right to fish in the waters covering the lands described in plaintiff's said petition, known as Mud Creek Bay, or Mud Bay; and the right to hunt ducks, geese, frogs, turtles, and other wild game in, upon, and over the waters of Mud Creek Bay.

Defendants deny that they have destroyed the breeding and feeding grounds of plaintiff's "wild game," or have scared or driven the same away, or in any way will render said premises unsuitable for hunting or fishing; and they deny that they threaten to continue to destroy or injure the feeding places of wild game and to scare and drive the same from said premises.

Defendants deny that plaintiff has made improvements on the parts of said premises covered by the waters of Mud Creek Bay.

Defendants deny that the Sandusky River empties into Sandusky Bay, but further answering say that the Sandusky River empties into Mud Creek Bay at or near Squaw Island.

Defendants deny that the stream, Mud Creek, empties into the Sandusky River.

Defendants further answering say that they have placed nets in said waters of Mud Creek Bay, and are now claiming the right to place nets therein for the purpose of catching fish, and they further say that they have hunted and still claim the right to hunt ducks, geese, frogs, turtles, and other wild game in, upon, and over the waters of Mud Creek Bay, which is the western continuation of Sandusky Bay, locally known as Mud Creek Bay, or Mud Bay, and is about four (4) miles long east and west, and from one-half mile to two and one-half miles wide north and south, and is from three to eight feet in depth throughout, and since the settlement of the country in that vicinity by white people, has been continuously and uninterruptedly used by the public for fishing and hunting and without objection from any until the plaintiff claimed the right to convert the said public water into a private duck pond for the exclusive use and enjoyment of its members and to exclude defendants from the privileges of hunting thereon and fishing therein.

Defendants therefore ask that plaintiff's petition be dismissed and defendants go hence and secure their costs.

GEO A. TRUE,
Defendants' Attorney.

[Duly Verified.]

STATE OF OHIO TO WINOUS POINT SHOOTING *CLUB.*

John Brough, Governor of the State of Ohio, to all to Whom these Presents shall Come, Greeting:

Whereas, by the certificate of the auditor of the county of Sandusky in the state of Ohio it appears that E. B. Sadler, trustee of the Winous Point Shooting Club has fully executed and complied with a contract entered into by him with the auditor and commissioners of said Sandusky county for the draining and reclaiming of certain swamp and overflowed lands under the act to provide for draining and reclaiming the swamp and overflowed lands granted to the state of Ohio by act of congress approved September 28th, 1850, passed March 2d, 1853, and is entitled to a patent for certain lands, parcel thereof in said certificate and hereinafter more particularly described.

Now, therefore, know ye that I, John Brough, governor aforesaid, in pursuance of the said act of the general assembly, and in behalf of the state of Ohio, do hereby grant unto the said E. B. Sadler, trustee, in trust for the use of the Winous Point Shooting Club and unto his successors as such trustees and assigns forever the following tract of land being the same in said certificate mentioned towit:

The north part fractional section twenty-five (25), township six (6), range sixteen (16), containing one hundred acres, more or less.

To have and to hold the said tract of land with the appurtenances unto the said E. B. Sadler, trustee as aforesaid, and unto his successors as such trustees and assigns forever.

In testimony whereof, I, the said governor have caused these to be made patent, have hereunto signed my name and caused the great seal of the state to be affixed at Columbus, this fifteenth day of February, in the year of our Lord eighteen hundred and sixty-five.

By the Governor,

JOHN BROUGH.

[Seal.] WM. HENRY SMITH,
Secretary of State.

Recorded in Book No. 1, page 134, deeds for swamp lands drained.

I, certify that the above patent is stamped with 50 cents revenue stamp duly canceled.

Received February 18, 1865.

Recorded March 10, 1865.

A. F. GALLAGHER,
Recorder.

JOHN W. MIZENER ET AL. TO WINOUS POINT SHOOTING CLUB.

(Warranty.)

To All People to Whom these Presents shall Come, Greeting:

Know ye, that we, John W. Mizener, Jane Mizener his wife, George B. Heller and Rhoda B. Heller his wife, the grantors for the consideration of fifteen hundred dollars received to our full satisfaction of the Winous Point Shooting Club, a corporation duly organized under the laws of Ohio,

to give, grant, bargain, sell and convey unto the said Winous Point Shooting Club the grantee, the following described tract or lot of land, situate in the township of Bay, in the county of Ottawa, and state of Ohio, and is known as

The southwest fractional quarter of fractional section No. thirteen (13), township No. six (6), range No. sixteen (16), containing one hundred and seven and ten hundredths (107 10-100) acres, be the same more or less but subject to all legal highways.

To have and to hold the above granted and bargained premises with the appurtenances thereto belonging unto the said Winous Point Shooting Club, its successors and assigns forever to and for its own proper use and behoof. And we, the said John W. Mizener and George B. Heller do for ourselves and our heirs, executors and administrators covenant with the said Winous Point Shooting Club, its successors and assigns, that at and until the ensealing of these presents, we were well seized of the premises, as a good and indefeasible estate in fee simple and have good right to bargain and sell the same in manner and form as above written and that the same be free from all incumbrances whatsoever. And furthermore that we the said John W. Mizener and George B. Heller do, by these presents, bind ourselves and our heirs forever to warrant and defend the above granted and bargained premises to the said Winous Point Shooting Club, its successors and assigns against all lawful claims and demands whatsoever. And we, the said Jane Mizener and Rhoda B. Heller, wives of the said John W. Mizener and Geo. B. Heller, do hereby remise, relase and forever quitclaim unto the said Winous Point Shooting Club, its successors and assigns, all our right and title of dower in the above described premises.

In witness whereof, we hereunto set out hands and seals the 13th day of August, in the year of our Lord one thousand eight hundred and eighty-three.

JOHN W. MIZENER (Seal).
JANE MIZENER (Seal).
GEO. B. HELLER (Seal).
RHODA B. HELLER (Seal).

Signed, sealed and delivered in the presence of

H. B. MAGRUDER,
GEO. FITZGEROLD.

The State of Ohio, Ottawa County, ss.

Port Clinton, O., Aug. 13, 1883.

Before me, a notary public within and for said county, personally appeared the said John W. Mizener, Jane Mizener, Geo. B. Heller and Rhoda B. Heller and acknowledged that they did sign and seal the foregoing instrument, and that the same is their free act and deed.

I further certify that I did examine the said Jane Mizener and Rhoda B. Heller, wives of said John W. Mizener and Geo. B. Heller, separate and apart from their said husbands, and did then and there make known to them the contents of the foregoing instrument and upon that examination they declared that they did voluntarily sign, seal and acknowledge the same and that they were still satisfied therewith.

In testimony whereof I hereunto set my hand and official seal, this 13th day of August, A. D. 1883.

[Notarial Seal.] H. B. MAGRUDER,
Notary Public.

Received August 13, 1883.
Recorded August 20, 1883.

C. C. TRUE,
Recorder.

Plaintiff's Exhibit 3. (E. G.)

E. B. SADLER TO WINOUS POINT SHOOTING CLUB.

Know all men by there presents, that I Ebenezer B. Sadler, of the county of Erie, in consideration of the sum of one dollar in hand paid by the Winous Point Shooting Club of Ottawa county, have granted, bargained, sold, remised, released and quitclaimed, and by these presents do grant, bargain, sell, remise, release and quitclaim unto the said Winous Point Shooting Club and to its assigns forever the following tracts and pieces of land situated in Sandusky county, Ohio, viz.: All of section thirty-four (34), township six (6), range sixteen (16), except fifty acres from south side.

All of fractional section No. twenty-seven in the same township lying north and south of Sandusky River, 180 acres.

Also all of fractional section twenty-five (25), in the same township 100 acres. Also all that part of fractional section twenty-six lying west of that portion deeded to Orson Wright by Thomas Silverwood supposed to be about one-half of said fractional section.

And also the northeast and one-fourth (¼) of fractional section number twenty-eight (28) in said township, lying north of the river, 150 acres.

Also any and all other lands which I hold in trust in said county for the members of said club.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining and the reversions, remainders, rents issues and profits thereof, and all the estate right, title, interest, claim or demand whatsoever of the said E. B. Sadler as trustee or otherwise

either in law or equity of, in and to the above bargained premises.

To have and to hold the same unto the said Winous Point Shooting Club, its assigns forever.

In testimony whereof I have hereunto set my hand and seal this 9th day of November, A. D. 1872.

E. B. Sadler, Trustee, (Seal).

Executed in presence of

Chas. Cross,
George Morton.

The State of Ohio, Erie County, ss.

Before me, Chas. Cross, justice of the peace in and for said county, personally appeared the above named E. B. Sadler, trustee, andacknowle dged the signing and sealing of the above conveyance to be his voluntary act and deed this 9th day of November, A. D. 1872.

Chas. Cross,
Justice of the Peace.

Received May 15, 1873.
Recorded May 17, 1873.

Wm. W. Stine,
County Recorder.

Plaintiff's Exhibit 4. (E. G.)

E. B. SADLER TO WINOUS POINT SHOOTING CLUB:

Know all men by these presents that I, E. B. Sadler, of Erie county, Ohio, the grantor, for divers good causes and consideration thereunto moving, and especially for the sum of one dollar ($1.00), received to my full satisfaction, of Winous Point Shooting Club, the grantee, have given, granted, remised, released and forever quitclaim and do by these presents absolutely give, grant, remise, release and forever quitclaim unto the said grantee its heirs and assigns forever all such right and title as I, the said grantor have or ought to have in and to the following described pieces or parcels of land situated in the township of Bay, county of Ottawa and state of Ohio, and known as the east part of the north part of the southeast quarter fractional section twenty-three (23), township six (6), range sixteen (16), containing thirteen 10-100 acres of land; also the north fractional part of southeast quarter of section twenty-one (21), township six (6), range sixteen (16), containing twenty-nine 49-100 acres of land; and the west part of the north part of the southeast quarter and the southwest quarter and the northeast quarter, both in section number twenty-three (23), township number six (6), range number sixteen (16), containing in the two last description fifty-one 74-100 acres of land, be the same more or less, to have and to hold the premises aforesaid with the appurtenances thereunto belonging unto the said grantee, its successors and assigns so that neither I, the said grantor, nor my heirs nor any other persons claiming title through or under me shall or will hereafter claim or demand any right or title to the premises or any part thereof, but they

and every one of them shall by these presents be excluded and forever barred.

In witness whereof, I hereunto set my hand and seal the twentieth day of November, in the year of our Lord one thousand eight hundred and seventy-five.

E. B. SADLER. (Seal.)

Signed, sealed and delivered in presence of

CHARLES W. SADLER,

THOMAS SILVERWOOD.

State of Ohio, Erie County, ss.

Before me, a notary public in and for said county, personally appeared the above-named E. B. Sadler, who acknowledged that he did sign and seal the foregoing instrument and that the same is his free act and deed.

In testimony whereof I hereunto set my hand and official seal at Sandusky, Erie county, this 20th day of November.

[Notarial Seal.] CHARLES W. SADLER,

Notary Public in and for Erie Co.

Received for record November 23, 1875. Recorded November 27, 1875.

G. W. BADER,

Recorder.

Plaintiff's Exhibit 5. (E. G.)

JOHN HINELINE AND WIFE TO WINOUS POINT SHOOTING CLUB:

Know all men by these presents that we, John Hineline and Mary Hineline, of Ottawa county, Ohio, the grantors, for the consideration of eight hundred dollars received to our satisfaction of the Winous Point Shooting Club, the grantee, do give, grant, bargain, sell and convey unto the said grantee and its assigns the following described premises situated in the township of Bay, county of Ottawa and state of Ohio, and known as the northwest quarter of the northwest quarter of section number twenty-two (22), also the northeast quarter of the northeast quarter of section twenty-one in said Bay township, be the same more or less, but subject to all legal highways, to have and to hold the above granted and bargained premises with the appurtenances thereunto belonging unto the said grantee and its assigns forever and the said grantors do for themselves and their heirs, executors and administrators covenant with the said grantee and its assigns that at and until the ensealing of these presents they were well seized of the above described premises as a good and indefeasible estate in fee simple and have good right to bargain and sell the same in manner and form as above written and that the same are free from all incumbrances whatsoever and will warrant and defend said premises with the appurtenances thereunto belonging to the said grantees and its assigns forever, against all lawful claims and demands whatsoever. And I, the said Mary Hineline, wife of said John P. Hineline, do hereby remise, release and forever quitclaim unto the said grantees and its assigns all my right and title of dower in the above described premises.

In witness whereof we hereto set our hands and seals the 16th day of July, in the year of our Lord one thousand eight hundred and seventy-five.

JOHN HINELINE (Seal).
MARY A. HINELINE (Seal).

Signed, sealed and delivered in presence of
S. MOTLEY,
E. B. SADLER.

State of Ohio, Ottawa County, ss.

Before me, a notary public in and for said county, appeared the above named John and Mary Hineline, who acknowledged that they did sign and seal the foregoing instrument and that the same is their free act and deed.

I further certify that I did examine the said Mary Hineline separate and apart from her said husband and did then and there make known to her the contents of the foregoing instrument, and upon that examination she declared that she did voluntarily sign, seal and acknowledge the same and that she is still satisfied therewith.

In testimony whereof I hereunto set my hand and official seal this 16th day of July, A. D. 1875.

[Notarial Seal.] S. MOTLEY,
Notary Public in and for Ottawa County, Ohio.

Received for record July 17, 1875. Recorded July 17, 1875.

G. W. BADER,
Recorder.

Plaintiff's Exhibit 6. (E. G.)

EBENEZER B. SADLER, TRUSTEE, TO WINOUS POINT SHOOTING CLUB.

Know all men by these presents: That I, Ebenezer B. Sadler, trustee of the county of Erie, Ohio, in consideration of the sum of one dollar, in hand paid by the Winous Point Shooting Club of Ottawa county, Ohio, have granted, bargained, sold, remised, released and quitclaimed and by these presents do grant, bargain, sell, remise, release and quitclaim unto the said Winous Point Shooting Club and to their assigns forever the following tracts and pieces of land situated and lying in Bay township in said county of Ottawa and described as follows, to-wit:

All of fractional section twenty-three, supposed to contain 345 acres more or less. Also the fractional south half of section twenty-two containing 120 acres more or less, and the south half of the northeast quarter and the southeast quarter of the northwest quarter of said section (22) in said township, containing 120 acres more or less. Also the southeast quarter of the northeast quarter of section 21, containing 40 acres. The north fractional part of the southeast quarter of said section (21), containing 29½ acres more or less. And the fractional part of the southwest quarter of the southeast quarter of said section 21 (Long Point), containing seven acres more or less. Also the whole of fractional section No. twenty-four (24) in said township, containing all of Eagle Island and part of Slate's Point and according to the original survey, including about 134¼ acres more or less. Also any and all other lands which I hold in trust in said township or county for the members of said club, including the right of way across E. Lattimore's lands

to the club house. Together with all and singular the hereditaments and appurtenances thereto belonging or in any wise appertaining and the reversions, remainders, rents, issues and profits thereof and all the estate right, title, interest, claim or demand whatsoever, of the said E. B. Sadler, trustee, either in law or equity, of, in and to the above bargained premises.

To have and to hold the same unto the said Winous Point Shooting Club, their assigns forever.

In testimony whereof, I have hereunto set my hand and seal this 25th day of November, A. D. 1872.

C. B. SADLER, Trustee, (Seal.)

Executed in the presence of

JOHN MACKEY,
CHARLES CROSS.

The State of Ohio, Erie County, ss.

Before me, Charles Cross, a justice of the peace in and for said county, personally appeared the above named E. B. Sadler, trustee, and acknowledged the signing and sealing of the above conveyance to be his voluntary act and deed this 25th day of November, A. D. 1872.

[Seal.] CHARLES CROSS,
Justice of Peace.

Received for record March 26, 1873. Recorded March 27, 1893.

G. WM. BADER,
Recorder.

Plaintiff's Exhibit 7. (E. G.)

LEWIS PETE AND WIFE TO WINOUS POINT SHOOTING CLUB.

Know all men by these presents, that we, Lewis Pete and Josephine Pete, the grantors, for the consideration of one hundred dollars received to our full satisfaction of the Winous Point Shooting Club, the grantees, do give, grant, bargain, sell and convey unto the said grantee, its successors and assigns, all their interest in the following described premises: Situated in the township of Bay, county of Ottawa and state of Ohio and known as an undivided half interest in the following described land, to-wit: The southeast fraction of section twenty (20), township six (6), range sixteen (16), containing sixty (60) acres of land; also lot No. two (2), in section twenty (20), township six (6), range sixteen (16), containing twenty (20) acres of land; said Pete reserves, however, the right of trap for muskrats and to pasture his own cattle, horses and pigs on said premises so long as he continues to live in said county, be the same more or less, but subject to all legal highways. To have and to hold the above granted and bargained premises, with the appurtenances thereunto belonging unto the said grantee, its successors and assigns forever. And we, the said grantors, do for ourselves and our heirs, executors and administrators, covenant with the said grantee, its successors and assigns that at and until the ensealing of these presents, we are well seized of the above described premises as a good and indefeasible estate in fee simple and have good right to bargain and sell the same in manner and form as above written, and that the same are free from all encumbrances whatsoever, and will warrant and defend said premises with the appurtenances thereunto

belonging to the said grantee, its successors and assigns forever against all lawful claims and demands whatsoever. And I, the said Josephine, wife of said Lewis, do hereby remise, release and forever quitclaim unto the said grantee and its successors and assigns, all my right and title of dower in the above described premises.

In witness whereof, we have hereunto set our hands and seals the 17th day of November, in the year of our Lord, one thousand eight hundred and seventy-three.

his
LEWIS X PETE. [SEAL.]
mark.
JOSEPHINE PETE. [SEAL.]

Signed, sealed and delivered in presence of,
R. M. HOLLINSHEAD,
JOHN DITLEFS.

The State of Ohio, Ottawa County, ss:

Before me, a notary public in and for said county, personally appeared the above named Lewis and Josephine Pete, who acknowledged that they did sign and seal the foregoing instrument and that the same is their free act and deed. I further certify, that I did examine the said Josephine Pete, separate and apart for her said husband, and did then and there make known to her the contents of the foregoing instrument, and upon that examination she declared, that she did voluntarily sign, seal and acknowledge the same and that she was still satisfied therewith.

In testimony whereof I have hereunto set my hand and official seal this 17th day of November, A. D. 1873.

[Notarial Seal.] R. M. HOLLINSHEAD,
Notary Public.

Received for record November 17, 1873.
Recorded November 18, 1873.

G. Wm. Bader,
Recorder.

Plaintiff's Exhibit No. 8. (E. G.)

ELIJAH LATTIMORE AND WIFE TO WINOUS POINT SHOOTING CLUB.

(Quitclaim.)

Know all men by these presents that I, Elijah Lattimore, of the county of Ottawa and state of Ohio, in consideration of the sum of one hundred dollars to me paid by the Winous Point Shooting Club, the receipt whereof is hereby acknowledged, do hereby grant .bargain, sell and convey, to the said Winous Point Shooting Club, their heirs and assigns forever, the following real estate situated in the county of Ottawa, in the state of Ohio, and in the township of Bay, and bounded and described as follows: Being all the marsh land that I own in sections fifteen (15) and twenty-two (22), township number six (6), range number sixteen (16); bounded as follows: on the west by the lands of John Lattimore in section fifteen (15), and John Hineline in section twenty-one (21), on the south by the land of the Winous Point Shooting Club, and extending east and north to the dry land or Winous Point so-called, containing thirty-five acres of land be the same more or less.

To have and to hold said premises with all the privileges and appurtenances thereunto belonging to the said Winous Point Shooting Club, their heirs and assigns forever. And the said Elijah Lattimore for himself and his heirs do hereby

covenant with the said Winous Point Shooting Club, their heirs and assigns, that he is lawfully seized of the premises aforesaid; that the said premises are free and clear from all incumbrances whatsoever, and that he will forever warrant and defend the same with the appurtenances unto the said Winous Point Shooting Club, their heirs and assigns against the lawful claims of all persons whosoever.

In witness whereof the said Elijah Lattimore and Christine Lattimore, his wife, in consideration of one dollar to her in hand paid by the grantees who hereby release her right of dower in the premises they hereunto set their hand and seal their 9th day of June in the year of our Lord one thousand eight hundred and seventy-five.

ELIJAH LATTIMORE (Seal).
CHRISTINA LATTIMORE (Seal).

Signed, sealed and acknowledged in the presence of
R. M. HOLLINSHEAD,
JOHN LATTIMORE.

State of Ohio, Ottawa County, ss.

Be it remembered that on this 9th day of June, A.D. 1875, before me, the subscriber, a notary public in and for said county, personally came the above named Elijah Lattimore, the grantor in the foregoing deed, and acknowledged the signing and sealing of the same to be his voluntary act and deed for the uses and purposes therein mentioned and the said Christine Lattimore, wife of said Elijah Lattimore, being at the same time examined by me separate and apart from her said husband, and the contents of said instrument being by me made known and explained to her then declared that she did voluntarily sign, seal and acknowledge the same and that

she is still satisfied therewith as her voluntary act and deed for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed my official seal on the day and year last aforesaid.

[Notary Seal.] R. M. HOLLINSHEAD,

Notary Public in this and for Ottawa County, Ohio.

Received for record, June 29, 1875.
Recorded July 7, 1875.

G. WM. BADER,
Recorder.

Plaintiff's Exhibit No. 9. (E. G.)

MARY BISNETTE TO WINOUS POINT SHOOTING CLUB.

To all People to Whom these Presents shall Come, Greeting:

Know ye, that I, Mary Bisnette, the grantor, for divers good causes and considerations thereunto moving and especially for the sum of seventy-one dollars received to my full satisfaction of The Winous Point Shooting Club, the grantee, have given, granted, remised, released and forever quitclaimed and do by these presents absolutely give, grant, remise, release and forever quitclaim unto the said grantee, its successors and assigns forever all such right and title as I, the said grantor, have or ought to have in and to the following described premises, situated in the township of Bay, county of Ottawa, and state of Ohio, and known as the northeast quarter of the southwest quarter of section 21, the northwest

quarter of the southwest quarter of section 21, the southeast quarter of the southwest quarter of section 21, the southwest quarter of the southwest quarter of section 21, and said quarters being fractional and comprising seventy and eighty-two one hundredths (70 82-100) acres of land be the same more or less. To have and to hold the premises aforesaid unto the said grantee its successors and assigns so that neither I, the said grantor, nor my heirs, nor any other persons claiming title through or under me shall or will hereafter claim or demand any right or title to the premises, or any part thereof, but they and every one of them shall by these presents be excluded and forever barred.

In witness whereof I hereunto set my hand and seal the 13th day of June in the year of our Lord one thousand eight hundred and seventy-four.

her
Mary X Bisnette (Seal).
mark

Signed sealed and delivered in presence of

R. M. Hollinshead,
Elijah Lattimore.

The State of Ohio, Ottawa County, ss.

Before me, a notary public in and for said county, personally appeared the above named Mary Bisnette who acknowledged that she did sign and seal the foregoing instrument and that the same is her free act and deed.

In testimony whereof I have hereunto set my hand and official seal, this 13th day of June A. D., 1874.

[Notarial Seal.] R. M. Hollinshead,
Notary Public.

Received for record June 13, 1874, at 6 o'clock P. M.
Recorded June 19, 1874.

G. Wm. Bader,
Recorder.

Plaintiff's Exhibit No. 10. (E. G.)

JOHN DOUGAN TO WINOUS POINT SHOOTING CLUB.

Know all men by these presents, that I, John Dougan, of the county of Ottawa, and state of Ohio, as guardian of Clara Eliz. Bisnette, of the county and state aforesaid, by virtue of an order and decree, made by the probate court within and for the county of Ottawa and state of Ohio, on the — day of — A. D. 187—, sold at private sale on the 11th day of June, A. D. one thousand eight hundred and seventy-four, to the Winous Point Shooting Club for the sum of one hundred and forty-dollars, the receipt whereof is hereby acknowledged, the following described real estate of the said Clara Eliz. Bisnette, said sum being the value thereof as appraised.

Situate in the township of Bay, (No. 6) county of Ottawa, and state of Ohio, and known as the northeast quarter of the southwest quarter of section 21, also northwest quarter of the southwest quarter of section 21, also southeast quarter of the southwest quarter of section 21, also southwest quarter of the southwest quarter of section 21, the same being fractional quarters and comprising seventy and eight-two one hundredths acres of land be the same more or less, but subject to the dower interenst of Mary Bisnette, widow of Gregory Bisnette, deceased. Said sale was afterwards, towit: on the 12th day of June A. D. 1874, approved and confirmed by

said court and said John Dougan as guardian as aforesaid ordered to execute and deliver to said Winous Point Shooting Club, its successors or assigns, a good and sufficient deed for said premises, subject to said dower interest, according to the statute in such case made and provided. Now, therefore, I, the said John Dougan, as guardian, as aforesaid in consideration of the premises, and by virtue of the power in me vested by law and the orders and decree of the court aforesaid, do hereby give, grant, bargain, sell and convey into the said Winous Point Shooting Club, its successors and assigns the real estate aforesaid, (subject to said dower interest) with all and singular the appurtenances thereunto belonging.

To have and to hold the same unto the said Winous Point Shooting Club, its successors and assigns forever.

In testimony whereof, I, as guardian, as aforesaid thereunto set my hand and seal this 13th day of June A. D. one thousand eight hundred and seventy-four.

his

JOHN X DOUGAN (Seal).

mark

Signed, sealed and delivered in presence of

R. M. HOLLINSHEAD,

ELIJAH LATTIMORE.

The State of Ohio, Ottawa County, ss.

On this 13th day of June A. D. 1874, before the undersigned authority personally appeared the above named John Dougan and acknowledged the signing and sealing of the foregoing deed to be his voluntary act and deed, as guardian of Clara Eliz. Bisnette.

[Notarial Seal.] R. M. HOLLINSHEAD,

Notary Public within and for Ottawa County, Ohio.

Received for record, June 13, 1874 at 6 o'clock P. M.
Recorded June 19, 1874.

G. Wm. Bader,
Recorder.

Plaintiff's Exhibit No. 11. (E. G.)

PETER DARR AND WIFE TO THE WINOU'S POINT SHOOTING CLUB.

Know all men by these presents, that we, Peter Darr and Anna Darr, of Bay township, Ottawa county, Ohio, the grantors for the consideration of seven hundred and fifty dollars ($750.00) received to our full satisfaction of the Winous Point Shooting Club, a corporation duly organized under the laws of Ohio, the grantees, do give, grant, bargain, sell and convey unto the said grantees, their heirs and assigns, the following described premises:

Situated in the township of Bay, county of Ottawa, and state of Ohio, and known as, south part of the west half of west part of northwest quarter (S. pt. W. ½ N. W. ¼) of section twenty-one (21), township six (6), range sixteen (16), containing twenty-five (25) acres of marsh land but subject to all legal highways. To have and to hold the above granted and bargained premises with the appurtenances thereunto belonging unto the said grantees, their heirs and assigns forever. And we the said grantors do for ourselves and our heirs, executors and administrators, covenant with the said grantees, their heirs and assigns, that at and until the ensealing of these presents we are well seized of the above described premises, as a good and indefeasible estate in fee simple, and have good right to bargain and sell the same in manner and form as

above written; that the same are free and clear from all encumbrances whatsoever, and that we will warrant and defend said premises with the appurtenances thereunto belonging to the said grantees, their heirs and assigns forever against all lawful claims and demands whatsoever. And at the said Anna Darr, wife of said Peter Darr, do hereby remise, release and forever quitclaim unto the said grantees and their heirs and assigns, all my right and title of dower in the above described premises.

In witness whereof we hereunto set our hands and seals, the 27th day of November, in the year of our Lord one thousand eight hundred and eighty-two.

PETER DARR (Seal).
ANNIE DARR (Seal).

Signed, sealed and delivered in presence of

J. H. MAGRUDER, JR.,
J. H. MAGRUDER.

The State of Ohio, Ottawa County, ss.

Before me a notary public in and for said county personally appeared the above named Peter Darr and Annie Darr, his wife, who acknowledged that they did sign and seal the foregoing instrument and that the same is their free act and deed. I further certify that I did examine the said Annie Darr, wife of Peter Darr, separate and apart from her said husband, and did then and there make known to her the contents of the foregoing instrument, and upon that examination she declared that she did voluntarily sign, seal and acknowledge the same, and that she is still satisfied therewith.

In testimony whereof I have hereunto set my hand and official seal at Port Clinton, Ohio, this 27th day of November, A. D. 1882.

[Notarial Seal.] J. H. MAGRUDER, JR.,
Notary Public.

Received December 11, 1882.
Recorded January 12, 1883.

C. C. TRUE,
Recorder.

Plaintiff's Exhibit No. 12. (E. G.)

T. KELLEY BOLTEN TO THE WINOUS POINT SHOOTING CLUB.

To all People to Whom these Presents shall Come, Greeting:

Know ye, that I, T. K. Bolton, the grantor, for divers good causes and consideration thereunto moving, especially for the sum of one dollar received to my full satisfaction of The Winous Point Shooting Club, the grantee, have given, granted, remised, released and forever quitclaimed and do by these presents absolutely give, grant, remise, release and quitclaim unto said grantee, its successors and assigns, forever all such right and title as I, the said grantor, have or ought to have in unto the following described premises, situated in the county of Ottawa, and state of Ohio, and known as the undivided (½) half of the southeast (¼) quarter of the northeast (¼) quarter of section number twenty (20), township (6) six, range number (16) sixteen, containing twenty acres; also the southwest part of the southwest (¼) quarter of section number (21) twenty-one, township number (6) six, range number (16) sixteen, containing thirty-five (35) acres. To

have and to hold the premises aforesaid unto the said grantee its heirs and assigns so that neither I, the said grantor, or my heirs nor any other person claiming title through or under me shall or will hereafter claim or demand any right or title to the premises or any part thereof, but they or every one of them shall by these presents be excluded and forever barred.

In witness whereof I hereto set my hand and seal the 12th day of December in the year of our Lord, one thousand eight hundred and seventy-five.

T. K. BOLTON (Seal).

Signed, sealed and delivered in presence of

JAMES WADE, JR.,
J. T. WORLEY.

State of Ohio, Cuyahoga County, ss.

Before me a notary public in and for said county personally appeared the above named T. K. Bolten, who acknowledged that he did sign and seal the foregoing instrument and that the same is his free act and deed.

In testimony whereof I have hereunto set my hand and official seal this 12th day of December, A. D. 1875.

[Notarial Seal.] JAMES WADE, JR.,
Notary Public.

Received for record December 29, 1875.
Recorded January 8, 1876.

G. WM. BADER,
Recorder.

Plaintiff's Exhibit No. 13. (E. G.)

CHARLES H. SWAIN HEIRS TO WINOUS POINT SHOOTING CLUB.

(Quitclaim.)

Be it known that we, Allen Swain, of St. Paul, Minn.; Mary E. Logan, of Jeffersonville, Indiana; Richard W. Swain, Ransom P. Swain and Francis Swain, of Toledo, Ohio, being the heirs at law of Charles H. Swain, deceased, and Mary Swain, wife of said Ransom Swain, Martha Swain, wife of said Richard W. Swain, Clara Swain, wife of said Allen Swain, and Richard D. Logan, husband of said Mary E. Logan, and Henry E. Bruckseeker, of Toledo, Ohio, in consideration of one hundred and fifty dollars ($150), to us paid by the Winous Point Shooting Club, do hereby bargain, sell and quitclaim to the said Winous Point Shooting Club, its successors and assigns forever, the following real estate, viz.: The whole of fractional section number 24, township six (6) north, range sixteen (16) east, situate in Ottawa county, Ohio, and being Eagle or Rice's Island in the Sandusky Bay; same land conveyed by Israel Osman and heirs of John Osman to Charles H. Swain, and containing one hundred and thirty-four and fifty-two one-hundredths (134 52-100) acres. Together with all the privileges and appurtenances to the same belonging, to have and to hold the same to the said grantee, its successors and assigns forever, hereby covenanting that the title conveyed is clear, free and unincumbered by any act of the grantors herein.

In witness whereof the grantors hereunto set their hands and seals this second (2nd) day of November, A. D. 1878.

T. D. Cone,
Clayton W. Everett,
F. Knauft,
F. Leithansen.

Signed, sealed and delivered in presence of

Ranson P. Swain (Seal).
Mary E. Swain (Seal).
Richard W. Swain (Seal).
Martha Swain (Seal).
Henry E. Bruckseeker (Seal).
Francis Swain (Seal).
Allen Swain (Seal).
Clara M. Swain (Seal).
Richard D. Logan (Seal).
Mary E. Logan (Seal).

State of Ohio, Lucas County, ss:

Be it remembered that on the second day of November, A. D. 1878, before me, the subscriber, a notary public within and for said county personally came Richard W. Swain and his wife, Martha Swain, Ranson P. Swain and his wife, Mary E. Swain, Francis Swain and Henry E. Bruckseeker, of Toledo, Ohio, part of the grantors in the above conveyance and acknowledged the signing and sealing thereof to be their voluntary act and deed, for the purposes therein mentioned and the said Martha Swain and Mary Swain being examined by me separate and apart from their said husbands and the contents of said deed made known and explained to them, they did declare that they did voluntarily sign, seal and acknowl-

edge the same and that they were still satisfied therewith as their act, and deed for the uses and pusposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year aforesaid.

[NOTARIAL SEAL.] THOMAS D. CONE,
Notary Public within and for Lucas County, Ohio.

State of Indiana, Clark County, ss:

Be it remembered that on the 4th day of December, A.D. 1878, before me, the subscriber, a notary public within and for said county, personally came Richard D. Logan and Mary E. Logan, husband and wife, two of the grantors in the above conveyance, and acknowledged the signing and sealing thereof to be their voluntary act and deed, for the purposes therein mentioned and the said Mary E. Logan being examined by me, separate and apart from her said husband, and the contents of said deed made known and explained, she did declare that she did voluntarily sign, seal and acknowledge the same and that she is still satisfied therewith as her free act and deed for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year aforesaid.

[Notarial Seal.] JAMES B. MERIWETHER,
Notary Public, Clark County, Ind.

State of Minnesota, Ramsey County, ss:

Be it remembered that on the 20th day of November, A.D. 1878, before me the subscriber, a notary public within and for said county, personally came Allen Swain and his wife, Clara

Swain, two of the grantors in the above conveyance and acknowledged the signing and sealing thereof to be their voluntary act and deed for the purposes therein mentioned and the said Clara Swain, being examined by me, separate, and apart, from her said husband and the contents of said deed made known and explained, she did declare that she did voluntarily sign, seal and acknowledge the same and that she is still satisfied therewith as her free act and deed for the uses and purposes therein mentioned.

[Notarial Seal.] F. KNAUFT,
Notary Public, Ramsey County, Minnesota.

Received for record December 13, 1878.
Recorded December 16, 1878.

G. WM. BADER,
Recorder.

Plaintiff's Exhibit 14. (E. G.)

MARY BISNETTE AND OTHERS TO WINOUS POINT SHOOTING CLUB.

To all people to whom these shall come, Greeting: Know ye that we, James Bisnette, Mary A. J. Bisnette, Catherine Bisnette, Mary Bisnette, Bartholomew Bisnette, the grantors, for divers good causes and consideration thereunto moving, especially for the sum of one hundred and twenty dollars received to our full satisfaction of the Winous Point Shooting Club, the grantee, have given, granted, bargained, remised, released and forever quitclaimed, and do by these absolutely give, grant, remise, release and forever quitclaim unto the said grantees, their heirs and assigns, forever all such right and title as we the said grantees have or ought to have in and

to following described premises, situated in the township of Bay, county of Ottawa, and state of Ohio, and known as southwest quarter of the northeast quarter of section number twenty-one (21), township number six (6), range number sixteen (16), containing 40 acres of land be the same more or less. To have and to hold the premises aforesaid unto the said grantees, their heirs and assigns, so that neither we the said grantors or their heirs, nor any other person claiming title, through or under them shall or will hereafter claim or demand any right or title to the premises or any part thereof, but they and every one of them shall by these presents, be excluded and forever barred, and I, the said Mary A. J. Bisnette, wife of said James Bisnette do hereby remise, release and forever quitclaim unto the said grantees and their heirs and assigns, all of the right and title of dower in the above described premises.

In witness whereof we hereunto set our hands and seals, the 30th day of June, in the year of our Lord, one thousand eight hundred and seventy-five.

MARY BISNETTE (Seal).
JAMES BISNETTE (Seal).
MARY A. J. BISNETTE (Seal).
his
BARTHOLOMEW X BISNETTE (Seal).
mark
CATHARINE BISNETTE (Seal).

Signed, sealed and delivered in presence of R. M. Hollinshead, Elijah Lattimore, witnesses to signature of Mary Bisnette, James Bisnette, Mary A. J. Bisnette, Bartholomew Bisnette and Catharine Bisnette.

State of Ohio, Ottawa County, ss:

Before me, a notary public, in and for said county, personally appeared the above named grantors, Mary Bisnette, James Bisnette, Mary A. J. Bisnette, Bartholemew Bisnette and Catherine Bisnette, who acknowledged that they did sign and seal the foregoing instrument, and that the same is their free act and deed. I further certify that I did examine the said Mary A. J. Bisnette, wife of the said James Bisnette, separate and apart from her said husband, and did then and there make known to her the contents of the foregoing instrument and upon that examination she declared that she did voluntarily sign, seal and acknowledge the same and that she is still satisfied therewith.

In testimony whereof I have hereunto set my hand and official seal this 30th day of June, A. D. 1875.

[NOTARIAL SEAL.] R. M. HOLLINSHEAD,

Notary Public within and for Ottawa County, Ohio.

Received for record July 3, 1875 at 8 o'clock P. M.

Recorded July 10, 1875.

G. WM. BADER,
Recorder.

Plaintiff's Exhibit, No. 15. (E. G.)

WILLIAM F. SPAULDING AND WIFE TO WINOUS POINT SHOOTING CLUB.

Know all men by these presents, that I, William F. Spaulding, the grantor, of the county of Ottawa, and state of Ohio, in consideration of the sum of seven hundred and fifty dollars ($750.00), to me paid by the Winous Point Shooting Club, the grantee, the receipt whereof is hereby acknowledged, do hereby grant, bargain and sell and convey to the said Winous

Point Shooting Club, their heirs and assigns forever, the following real estate situated in the county of Ottawa, in the state of Ohio, and in the township of Bay and bounded and described as follows: Being the northeast quarter of the northwest quarter and the northwest quarter of the northeast quarter of section twenty-one (21), township six (6), range sixteen (16), containing eighty (80) acres of land, be the same more or less to have and to hold said premises with all the privileges and appurtenances thereunto belonging to the said Winous Point Shooting Club, their heirs and assigns forever, and the said William F. Spaulding for himself and his heirs do hereby covenant with the said Winous Point Shooting Club, their heirs and assigns, that he is lawfully seized of said premises aforesaid, that the said premises are free and clear from all incumbrances whatever and that he will forever warrant and defend the same with the appurtenances unto the said Winous Point Shooting Club, their heirs and assigns against the lawful claims of all persons whomsoever.

In witness whereof the said William F. Spaulding and Jeannette Spaulding, his wife, who hereby releases her right of dower in the premises have hereto set their hands and seals this 3d day of June, in the year of our Lord, one thousand and eight hundred and seventy-eight.

WILLIAM F. SPAULDING (Seal).

JEANNETTE SPAULDING (Seal).

Signed, sealed and acknowledged in presence of.

H. B. MAGRUDER,

S. MOTLEY.

State of Ohio, Otawa County, ss:

Be it remembered that on this third day of June, A. D. 1878, before me, the subscriber, a justice of the peace in and for said county, personally came the above named William F. Spauld-

ing, the grantor in the foregoing deed and acknowledged the signing and sealing of the same to be his voluntary act and deed for the uses and purposes therein mentioned, and the said Jeannette Spaulding, wife of the said William F. Spaulding, being at the same time examined by me, separate and apart from her said husband, and the contents of said instrument being by me made known and explained to her, she then declared that she did voluntarily sign and seal and acknowledge the same and that she still is satisfied therewith as her voluntary act and deed for the uses and purposes therein mentioned.

In testimony whereof, I have hereto subscribed my name and affixed my official seal on this day and year last aforesaid.

S. MOTLEY,
Justice of the Peace.

Received for record June 3, 1878.
Recorded June 4, 1878.

G. W. BADER,
Recorder.

Plaintiff's Exhibit, No. 18. (E. G.)

ELIJAH LATTIMORE TO WINOUS POINT SHOOTING CLUB.

Know all men by these presents, that I, Elijah Lattimore, of the county of Ottawa, Ohio, in consideration of the sum of ten dollars in hand paid by the Winous Point Shooting Club, grantee have bargained and sold and do hereby grant and convey to the said grantee and to the members thereof, the exclusive right excepting and reserving to myself the said grantor's right, a friend of hunting, pursuing and shooting ducks, snipe, woodcock and all other game birds and wild

fowls of every kind and description on all lands by me owned, situated in said county.

The east half of the west half and the west half of the southeast quarter of section number fifteen (15), and also the northeast quarter of the northwest quarter of section twenty-two (22), all in township six (6), range sixteen, excepting the marsh, this day sold to the said grantee.

And, I, the said grantor, consent and grant to said grantee the use of the fences as they are now or may hereafter be constructed on my said land, to form an inclosure of said land and of the land adjoining the same owned by said grantee and do hereby authorize and empower said grantee to take all such lawful measures as to it seems fit to protect said grantee and its said members in the exclusive right in the enjoyment of the easement, license and privileges herein sold and granted to said grantee.

ELIJAH LATTIMORE. [SEAL.]

Signed, sealed and delivered in presence of

R. M. HOLLINSHEAD,

JOHN LATTIMORE.

State of Ohio, Ottawa, County, ss.

Before me, a notary public, in and for said county, personally appeared the above named Elijah Lattimore, who acknowledged that he did sign and seal the foregoing instrument and that the same is his free act and deed.

[Notarial Seal.] R. M. HOLLINSHEAD,

Notary public within and for Ottawa county, Ohio.

Received for record June 29, 1875.

Recorded July 7, 1875.

G. WM. BADER,

Recorder.

Plaintiff's Exhibit No. 17. (E. G.)

JOHN WALCHER AND WIFE TO E. B. SADLER, TRUSTEE WINOUS POINT SHOOTING CLUB.

Know all men by these presents, that we, John Walcher and Barbara Walcher, his wife, of the county of Erie, and state of Ohio, in consideration of the sum of eight hundred dollars in hand paid by E. B. Sadler, trustee for Winous Point Shooting Club, of said county, have bargained and sold and do hereby grant, bargain, sell and convey unto the said E. B. Sadler, in trust for said club and to his heirs and assigns forever, the following premises situate in the county of Ottawa, in the state of Ohio and in the township of Bay, and bounded and described as follows:

Being all of fractional section twenty-four in said Bay township, range sixteen, town six north. Being all of that tract of land and marsh known as Eagle Island and being the same premises said Walcher purchased of one Benj. F. Smith and wife, by deed bearing date May 3, 1864, recorded in volume I, page 235, of Ottawa County Records, and we also hereby sell and convey to said Sadler in trust as aforesaid the three shanties John Walcher built on Winous Point and now remaining there together with all other erections made by said Walcher on said point and all lumber and buildings material left and still remaining on said point by said Walcher. To have and to hold said premises with the appurtenances unto the said E. B. Sadler in trust as aforesaid, heirs and assigns forever, and the said John Walcher for himself and his executors, administrators and heirs do hereby covenant with the said E. B. Sadler, trustee, his heirs and assigns, that he is lawfully seized of the premises aforesaid, that the premises are free and clear from all incumbrances whatsoever and that

he will forever warrant and defend the same with the appurtenances unto the said E. B. Sadler, trustee, and to his heirs and assigns, against the lawful claims of all persons whomsoever. And be it further known that I, Barbara Walcher, wife of the above named grantor, in consideration of one dollar to me in hand paid, the receipt whereof is hereby acknowledged do hereby remise, release and forever quitclaim to said grantee, his heirs and assigns all my right, title and interest in and to the above granted premises either by way of dower or otherwise.

In testimony whereof, we, the said John Walcher and Barbara, have hereunto set our hands and seals this 22nd day of September in the year of our Lord, one thousand eight hundred and seventy-one.

JOHANIS WALCHER (Seal).
BARBARA WALCHER (Seal).

Signed, sealed, acknowledged and delivered in presence of

E. M. COLVER,
WILLIAM BARRIGAN.

$1.00 revenue stamp cancelled.

The State of Ohio, Erie County, ss.

Be it remembered that on the 22nd day of September, A. D., 1871, before me, the subscriber, a probate judge, came John Walcher and Barbara Walcher, the signers and sealers of the within conveyance, and then and there acknowledged the same to be their act and deed for the uses and purposes herein expressed, and likewise came Barbara Walcher, wife of the said John Walcher, who being by me examined separate and apart from her said husband and the contents of the within instrument being by me made known to her then and there

acknowledged the same to be her act and deed by her voluntarily executed without fear of a coercion from her said husband and that she is still satisfied therewith.

[Probate Seal.] E. M. COLVER,
Probate Judge.

Received October 21, A. D., 1871.
Recorded same day.

A. R. SCHLOSSER,
Recorder.

Plaintiff's Exhibit No. 16.

L. M. HUBBY AND WIFE TO WINOUS POINT SHOOTING CLUB.

To all People to Whom these Presents Shall Come, Greeting:

Know ye, that we, Leander M. Hubby and Sarah F. Hubby, wife of said Leander M., the grantor, for divers good causes and considerations thereunto moving, especially for the sum of eighty dollars received to our full satisfaction of The Winous Point Shooting Club, the grantee, have given, granted, remised, released and forever quitclaimed and do by these presents absolutely give, grant, remise, release and forever quitclaim unto the said grantee, its successors and assigns forever, all such right and title as we, the said grantors, have or ought to have in and to the following described premises, situated in the township of Bay, county of Ottawa, and state of Ohio, and known as

The southeast quarter of the northwest quarter of section twenty-one (21), the south half of the southeast quarter of section twenty (20), and the southwest quarter of the northwest quarter of section twenty-two (22), all in township six (6),

north of range sixteen (16) east, containing one hundred and sixty acres of land.

To have and to hold the premises aforesaid, unto the said grantee, its successors and assigns, so that neither we, the said grantors, or our heirs nor any other persons claiming title through or under us shall or will hereafter claim or demand any right or title to the premises or any part thereof, but they and every one of them shall by these presents be excluded and forever barred. And I, the said Sarah F. Hubby, wife of said Leander M. Hubby, do hereby remise, release, and forever quitclaim unto the said grantee and its successors and assigns, all of my right and title of dower in the above described premises.

In witness whereof, we hereunto set our hand and seal the 10th day of August in the year of our Lord, one thousand eight hundred and seventy-five.

L. M. HUBBY (Seal).
SARAH F. HUBBY (Seal).

Signed, sealed, and delivered in presence of

ARTHUR ODELL,
H. L. CROSS.

The State of Ohio, Cuyahoga County, ss.

Before me, a notary public in and for said county personally appeared the above named, Leander M. Hubby and Sarah F. Hubby, who acknowledged that they did sign and seal the foregoing instrument and that the same is their free act and deed. I further certify, that I did examine the said Sarah F. Hubby separate and apart from her said husband, and did then and there make known to her the contents of the foregoing instrument and upon that examination she declared that she did voluntarily sign, seal, and acknowledge the same, and that she was still satisfied therewith.

In testimony whereof, I have hereunto set my hand and official seal, this 14th day of August, A. D., 1875.

[Notarial Seal.] ARTHUR ODELL,
Notary Public.

Received for record September 6, 1875.
Recorded September 7, 1875.

G. WM. BADER,
Recorder.

Plaintiff's Exhibit No. 19. (E. G.)

JOHN D. McRITCHIE, ET AL. TO THE WINOUS POINT SHOOTING CLUB.

(Warranty Deed.)

Known all men by these presents, that we, John D. McRitchie, Sarah McRitchie, his wife, David McRitchie, Alice M. McRitchie, his wife, James H. McRitchie and Clara E. McRitchie, his wife, the grantors, in consideration of three hundred dollars ($300.00) to us paid by The Winous Point Shooting Club, a corporation duly organized under the laws of Ohio, the grantee, the receipt whereof is hereby acknowledged, do hereby bargain, sell and convey to the said grantee, its successors and assigns forever, the following real estate, situated in the township of Bay, county of Ottawa and state of Ohio, and being and described as follows, viz.:

The southwest quarter of the southeast quarter of section number fourteen (14), in township number six (6), range number sixteen (16), containing forty acres, with all buildings and improvements thereon, together with the privileges and appurtenances to the same belonging.

To have and to hold the same to the said grantee, its successors and assigns forever. And we, the said grantors, do for ourselves and our heirs, executors and administrators covenant with the said grantee, its successors and assigns, that

at and until the ensealing of these presents, we are well seized of the above described premises as a good and indefeasible estate in fee simple and have good right to bargain and sell the same in manner and form as above written; that the same are free and clear from all incumbrances whatsoever, and that we will and our heirs, executors and administrators, shall warrant and defend said premises with the appurtenances thereunto belonging to the said grantee, its successors and assigns forever against all lawful claims and demands whatsoever. And Sarah McRitchie, Alice M. McRitchie and Clara E. McRitchie, wives of said John D. McRitchie, David McRitchie and James H. McRitchie in consideration of one dollar to us in hand paid, do remise, release and forever quitclaim unto the said grantee all our right by way of dower or otherwise in and to the above granted premises.

In witness whereof, we the said John D. McRitchie, Sarah McRitchie, David McRitchie, Alice M. McRitchie, Jas. H. McRitchie and Clara E. McRitchie hereunto set our hands and seals this 24th day of May in the year eighteen hundred and eighty-four.

JOHN D. McRITCHIE (Seal).
SARAH McRITCHIE (Seal).
DAVID McRITCHIE (Seal).
ALICE M. McRITCHIE (Seal).
JAMES H. McRITCHIE (Seal).
CLARA E. McRITCHIE (Seal).

Signed, sealed, acknowledged and delivered in presence of

H. B. MAGRUDER,
GEOR. FITZGERALD,
} Witnesses as to JOHN D. McRITCHIE, DAVID McRITCHIE, JAMES H. McRITCHIE, ALICE M. McRITCHIE.

J. P. LATTIMORE,
MINNIE LATTIMORE.
} Witnesses as to SARAH McRITCHIE, CLARA E. McRITCHIE.

The State of Ohio, Ottawa County, ss:

Be it remembered, that on this 24th day of May, in the year of our Lord, one thousand, eight hundred and eighty-four, before me, the subscriber, a notary public within and for said county, personally came John D. McRitchie, David McRitchie, Jas. H. McRitchie and Alice M. McRitchie, four of the grantors in the above conveyance, and acknowledged the same to be their voluntary act and deed for the purpose therein mentioned. And the said Alice M. McRitchie, wife of the said David McRitchie, being examined by me, separate and apart from her said husband and the contents of said deed made known and explained to her, did declare that she did voluntarily sign, seal and acknowledge the same and that she is still satisfied therewith as her act and deed for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year aforesaid.

[NOTARIAL SEAL.] H. B. MAGRUDER,
Notary Public.

The State of Ohio, Ottawa County, ss:

Be it remembered, that on the 26th day of May, A. D. 1884, before me, the subscriber, a justice of the peace within and for said county, personally came Sarah McRitchie and Clara E. McRitchie, two of the grantors in the above conveyance and acknowledged the same to be their voluntary act and deed for the purpose therein mentioned. And the said Sarah McRitchie, wife of the said John D McRitchie and Clara E. McRitchie, wife of the said Jas. H. McRitchie, being examined by me separate and apart from their said husbands, and the contents of said deed made known and explained to them, did de-

clare that they did voluntarily sign, seal, and acknowledge the same, and that they are still satisfied therewith as their voluntary act and deed for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto set my hand and affixed my name o he day and year aforesaid.

J. P. LATTIMORE,
Justice of the Peace.

Received May 27, 1884.
Recorded June 24, 1884.

N. A. CLEMONS,
Recorder.

Plaintiff's Exhibit 20. (E. G.)

JACOB HOPFINGER AND WIFE TO WINOUS POINT SHOOTING CLUB.

Know all men by these presents, that we, Jacob Hopfinger and Katherine Hopfinger, wife of said Jacob Hopfinger, the grantors, for the consideration of one hundred dollars received to our full satisfaction of the Winous Point Shooting Club, the grantee, do give, grant, bargain, sell and convey unto the said grantee, its successors and assigns the following described premises:

Situated in Bay township, county of Ottawa, and state of Ohio and known as the northwest quarter of the northeast quarter of section 22, also the west one-half of the northeast quarter of the northeast quarter of section 22, all in township six (6), range sixteen (16), comprising sixty acres of land. Said grantors reserving the right to pasture cattle, horses and hogs, belonging to themselves or their heirs on said premises be the same more or less, but subject to all legal highways.

To have and to hold the above granted and bargained premises, with the appurtenances thereunto belonging unto the said grantee, its successors and assigns forever, and we the said grantors do for ourselves, and our heirs, executors and administrators, covenant with the said grantee, its successors and assigns, that at and until the ensealing of these presents we are well seized of the above described premises as a good and indefeasible estate in fee simple and have good right to bargain and sell the same in manner and form as above written; and that the same are free from incumbrances whatsoever, and will warrant and defend said premises with the appurtenances thereunto belonging to the said grantee, its successors and assigns forever against the lawful claims and demands whatsoever, and I, the said Katherine Hopfinger, wife of said Jacob Hopfinger, do hereby remise, release, and forever quitclaim unto the said grantee, and its successors and assigns all my right and title of dower in the above described premises.

In witness whereof we have hereunto set our hands and seals the 15th day of November in the year of our Lord one thousand eight hundred and seventy-three.

JACOB HOPFINGER (Seal).
KATHERINE HOPFINGER (Seal).

Signed sealed and delivered in presence of
R. M. HOLLINSHEAD,
G. WM. BADER.

The State of Ohio, Ottawa County, ss.

Before me a notary public in and for said county, personally appeared the above named Jacob Hopfinger who acknowledged that he did sign and seal the foregoing instrument and that the same is his free act and deed. I further cer-

tify that I did examine the said Katherine Hopfinger separate and apart from her said husband and did then and there make known to her the contents of the foregoing instrument and upon that examination she declared that she did voluntarily sign, seal and acknowledge the same and that she is still satisfied therewith.

In testimony whereof I have hereunto set my hand and official seal this 15th day of November A. D. 1873.

[Notarial Seal.] R. M. HOLLINSHEAD,
Notary Public.

(Notarial Seal.)

Received for record November 15, 1873.
Recorded November 18, 1873.

G. WM. BADER,
Recorder.

Plaintiff's Exhibit 21. (E. G.)

WARRANTY DEED.

Know all men by these presents, that we, Amos Earl and Elizabeth Earl, of the county of Ottawa and state of Ohio, in consideration of the sum of forty dollars in hand paid by E. B. Sadler, trustee for Winous Point Shooting Club of Erie county, I have bargained and sold and do hereby bargain, sell and convey unto the said Sadler, trustee as aforesaid, his heirs and assigns forever, the following premises, situate in the county of Ottawa, in the state of Ohio, and in Bay township, and bounded and described as follows, viz.:

Being the southeast quarter of the northwest quarter of section number twenty-two (22), and is the same piece of land the said Earl purchased from the state of Ohio as swamp lands in 1861.

To have and to hold said premises with the appurtenances unto the said E. B. Sadler as such trustee, and to his heirs and assigns forever, and the said Amos Earl for himself and heirs do hereby covenant with the said Sadler, trustee, and his heirs and assigns that he is lawfully seized of the premises aforesaid, that the premises are free and clear from all incumbrances whatever and that he will forever warrant and defend the same with the appurtenances unto the said Sadler, trustee, his heirs and assigns against the lawful claims of all persons whomsoever. And be it further known that I, Elizabeth Earl, wife of the above named grantor in consideration of one dollar to me in hand paid the receipt whereof is hereby acknowledged, do hereby remise, release and forever quitclaim to said grantee, his heirs and assigns, all my right, title and interest in and to the above granted premises either by way of dower or otherwise.

In testimony whereof, we, the said Amos and Elizabeth Earl, have hereunto set our hands and seals this 23rd day of June, in the year of our Lord one thousand eight hundred and sixty-four.

AMOS EARL (Seal).
ELIZABETH EARL (Seal).

Signed, sealed, acknowledged and delivered in the presence of

WM. F. MEYERS,
F. GUISESDORF.

The State of Ohio, Erie County, ss.

Be it remembered that on this 23d day of June, A. D. 1863, before me, the subscriber, justice of the peace, came Amos Earl, the signer and sealer of the within conveyance and then and there acknowledged the same to be his act and deed for the uses and purposes therein expressed. And likewise

came Elizabeth Earl, wife of the said Amos Earl, who being by me examined separate and apart from her said husband and the contents of the within instrument being by me made known to her then and there acknowledged the same to be her act by her voluntarily executed without fear of or coercion from her said husband and that she is still satisfied therewith.

WM. F. MEYERS,
Justice of the Peace.

Received for record June 8, 1864.
Recorded June 9, 1864.

O. E. NYE,
Recorder.

Plaintiff's Exhibit 22. (E. G.)

CATHERINE BISNETTE AND OTHERS TO WINOUS POINT SHOOTING CLUB.

Know all men by these presents, that we, Catherine Bisnette, widow of Thomas Bisnette, deceased, Elizabeth Bisnette, Bartholomew Bisnette, James Bisnette, Mary A. J. Bisnette, Christopher Bisnette, Sarah Bisnette, Ellen Angelia Bisnette, Catherine Bisnette, Jr., and Mary Bisnette, in consideration of sixty (60) dollars to us paid by the Winous Point Shooting Club, do hereby bargain, sell and quitclaim to the said Winous Point Shooting Club, their heirs and assigns forever the following real estate, viz.: in Bay township, county of Ottawa and state of Ohio, being the undivided one-half of the following described property, the southeast fractional quarter of section twenty (20), township six (6), range sixteen (16), containing sixty (60) acres, and lot number two (2), in section number twenty (20), township number six (6), range number sixteen (16), containing twenty (20) acres of

land the amount surveyed herein is forty acres more or less, together with the privileges and appurtenances to the same belonging.

To have and to hold the same to the said grantees, their heirs and assigns forever, hereby covenanting that the title conveyed is clear, free and unincumbered by any act of the grantors herein.

In witness whereof the said Catherine Bisnette, Sr., Elizabeth Bisnette, Bartholomew Bisnette, James Bisnette, Mary A. J. Bisnette, Christopher Bisnette, Sarah Bisnette, Ellen Angelia Bisnette, Catherine Bisnette, Jr., and Mary Bisnette, hereunto set our hands and seals this 23d day of June, in the year eighteen hundred and seventy-three.

her
CATHERINE X BISNETTE (Seal).
mark

JAMES BISNETTE (Seal).
MARY A. J. BISNETTE (Seal).
CATHERINE BISNETTE (Seal).
SARAH V. BISNETTE (Seal).
MARY BISNETTE (Seal).
CHRIS. BISNETTE (Seal).

his
BARTHOLOMEW X BISNETTE (Seal).
mark

ELLEN ANGELIA BISNETTE (Seal).
ELIZABETH BISNETTE (Seal).

Signed, sealed and delivered in presence of R. M. Hollinshead and Elijah Lattimore, witnesses to all but Elizabeth's signature.

W. J. Bordman and R. E. Mix, witnesses to Elizabeth Bisnette's signature.

State of Ohio, Ottawa County, ss.

Be it remembered that on the 23d day of June in the year of our Lord one thousand eight hundred and seventy-three, before me the subscriber, a notary public within and for said county personally came Catherine Bisnette, Jr., Bartholomew Bisnette, James Bisnette, Mary A. J. Bisnette, Christopher Bisnette, Sarah Bisnette, Ellen Angelia Bisnette, Mary Bisnette, Catherine Bisnette, Sr., the grantors in the above conveyance and acknowledged the signing and sealing thereof to be their voluntary act and deed for the purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year aforesaid.

R. M. Hollinshead,
Notary Public.

State of Ohio, Cuyahoga County, ss.

Before me, a notary public, in and for said county personally appeared Elizabeth Bisnette, who acknowledged that she did sign and seal the foregoing instrument and that the same is her free act and deed.

In testimony whereof I have hereunto set my hand and official seal this 11th day of August, A. D. 1873.

[Notarial Seal.] R. E. Mix,
Notary Public.

Received for record August 26, 1873.
Recorded August 26, 1873.

G. Wm. Bader,
Recorder.

Plaintiff's Exhibit 23. (E. G.)

PETER DARR ET AL. TO THE WINOUS POINT SHOOTING CLUB, A CORPORATION.

(Quitclaim Deed.)

Known all men by these presents, that we, Peter Darr, Annie Darr, wife of said Peter Darr, and Michael Darr, unmarried, the grantors, for divers good causes and considerations thereunto moving, and especially for the sum of one dollar ($1.00), received to our full satisfaction of The Winous Point Shooting Club, a corporation, the grantee, have given, granted, remised, released and forever quitclaimed, and do by these presents absolutely give, grant, remise, release and forever quitclaim unto the said grantee, its successors and assigns forever, all such right and title as we, the said grantors have or ought to have, in and to the following described piece or parcel of land:

Situated in the township of Bay, county of Ottawa and state of Ohio, and known as the southwest quarter (S. W. ¼) of the northwest quarter (N. W. ¼) of section number twenty-one (21), township number six (6), range number sixteen (16), east, containing 40 acres of marsh land.

To have and to hold the premises aforesaid, with the appurtenances thereunto belonging, unto the said grantee, its successors and assigns, so that neither we, the said grantors, nor our heirs, nor any other person claiming title through or under us, shall or will hereafter claim or demand any right or title to the premises, or any part thereof; but they and every one of them shall, by these presents, be excluded and forever barred.

And I, the said Annie Darr, wife of said Peter Darr, do hereby remise, release and forever quitclaim unto the said grantee, its successors and assigns, all my right and title of dower in the above described premises.

In witness whereof, we hereunto set our hands and seals the 8th day of November, in the year of our Lord one thousand eight hundred and ninety-three.

PETER DARR (Seal).
ANNIE DARR (Seal).
MICHAEL DARR (Seal).

Signed, sealed, and delivered in presence of

H. B. MAGRUDER.
MILES NEWTON.

The State of Ohio, Ottawa County, ss.

Before me, a notary public in and for said county, personally appeared the above named Peter Darr, Annie Darr and Michael Darr, the grantors, who acknowledged that they did sign and seal the foregoing instrument, and that the same is their free act and deed.

In testimony whereof, I have hereunto set my hand and official seal, at Port Clinton, Ohio, this 8th day of November, A. D. 1893.

[NOTARIAL SEAL.] H. B. MAGRUDER,
Notary Public.

Received for record December 28, A. D. 1893, at 2:20 o'clock P. M.

Recorded this 10th day of January, A. D. 1894.

N. A. CLEMONS,
Recorder Ottawa County, O.

Plaintiff's Exhibit 2. (E. G.)

WARRANTY DEED.

Know all men by these presents, that we, Wm. H. Wright and Nancy Wright, of Sandusky county, Ohio, the grantors for the consideration of nine hundred dollars, received to our full satisfaction of The Winous Point Shooting Club, the grantee, do give, grant, bargain, sell and convey unto the said grantee, its successors and assigns, the following described premises, situated in the township of Riley, county of Sandusky, and state of Ohio, and known as one undivided half of all of that portion of section twenty-six (26), in said township owned by said grantor and one Thomas McCreery, and described as follows:

Bounded on the north, east and south, by the north, east and south lines of said section 26, and on the west by the land of said grantee. Being all owned by us in said section 26. Be the same more or less, but subject to all legal highways.

To have and to hold the above granted and bargained premises, with the appurtenances thereunto belonging, unto the said grantee, its successors and assigns forever. And we, the said grantors, do for ourselves and our heirs, executors and administrators, covenant with the said grantee, its successors and assigns, that at and until the ensealing of these presents, we are well seized of the above described premises as a good and indefeasible estate in fee simple and have good right to bargain to sell the same in manner and form as above written, and that the same are free from all encumbrances whatsoever; and will warrant and defend said premises, with the appurtenances thereunto belonging, to the said grantee, its successors and assigns forever, against all lawful claims and demands whatsoever.

And I, the said Nancy Wright, wife of said Wm. H. Wright, do hereby remise, release and forever quitclaim unto the said grantee, and its successors and assigns, all my right and title of dower in the above described premises.

In witness whereof, I hereunto set my hand and seal, the twelfth (12th) day of September, in the year of our Lord one thousand eight hundred and seventy-six.

WILLIAM H. WRIGHT (Seal).

her

NANCY X WRIGHT (Seal).

mark

Signed, sealed, and delivered in presence of

WM. WOODFORD,

RACHEL JANE WOODFORD.

The State of Ohio, Sandusky County, ss.

Before me, a justice of the peace, in and for said county, personally appeared the above named Wm. H. Wright and Nancy Wright, his wife, who acknowledged that they did sign and seal the foregoing instrument, and that the same is their free act and deed.

I further certify that I did examine the said Nancy Wright, wife of said Wm. H. Wright, separate and apart from her said husband, and did then and there make known to her the contents of the foregoing instrument and upon that examination she declared that she did voluntarily sign, seal and acknowledge the same, and that she was and is still satisfied therewith.

In testimony whereof I hereunto set my hand and official seal, this twelfth (12th) day of September, A. D. 1876.

WM. WOODFORD,

Justice of the Peace.

Plaintiff's Exhibit 24. (E. G.)

BARBARA DARR TO THE WINOUS POINT SHOOTING CLUB.

(Quitclaim Deed.)

Known all men by these presents, that I, Barbara Darr, widow of Michael Darr, deceased, the grantor, for divers good causes and considerations thereunder moving, and especially for the sum of one dollar ($1.00), received to my full satisfaction of The Winous Point Shooting Club, the grantee, have given, granted, remised, released and forever quitclaimed, and do by these presents, absolutely give, grant, remise, release and forever quitclaim unto the said grantee, its successors and assigns forever, all such right and title as I, the said grantor, have or ought to have, in and to the following described piece or parcel of land:

Situated in the township of Bay, county of Ottawa, and state of Ohio, and known as the south part of the west half of the west part of the northwest quarter of section twenty-one (21), township six (6), range sixteen (16), containing twenty-five acres (25) of marsh land. Also the south twenty (20) acres of the east part of the west part of the northwest quarter of said section twenty-one (21).

To have and to hold the premises aforesaid, with the appurtenances thereunto belonging, unto the said grantee, its successors and assigns, so that neither I, the said grantor, nor my heirs, nor any other person claiming title through or under me, shall or will hereafter claim or demand any right or title to the premises, or any part thereof; but they and every one of them shall, by these presents, be excluded and forever barred.

In witness whereof, I hereunto set my hand and seal the 23rd day of February, in the year of our Lord one thousand eight hundred and ninety-three.

BARBARA DARR. [SEAL.]

Signed, sealed and delivered in the presence of

PAUL HANSEN,

PETER DARR.

The State of Ohio, Ottawa County, ss.

Before me, a justice of the peace, in and for said county, personally appeared the above named Barbara Darr, who acknowledged that she did sign and seal the foregoing instrument, and that the same is her free act and deed.

I further certify, that I did examine the said Barbara Darr, separate and apart from, and did then and there make known to her the contents of the foregoing instrument, and upon that examination she declared that she did voluntarily sign, seal and acknowledge the same, and that she was still satisfied therewith.

In testimony whereof, I have hereunto set my hand and official seal, at Bay township this 23rd day of February, A. D. 1893.

PAUL HAUSEN,

Justice of the Peace.

Received for record May 15, A. D. 1893 at 9:40 o'clock A. M.

Recorded this 13th day of June, A. D. 1893.

N. A. CLEMONS,

Recorder Ottawa County, O.

Plaintiff's Exhibit 25. (E. G.)

CHARLES J. CLARKE AND WIFE TO WINOUS POINT HUNTING AND SHOOTING CLUB.

(Warranty Deed.)

Know all men by these presents, that we, Charles J. Clarke and Louisa S. Clarke, the grantors, for the consideration of seven hundred and fifty dollars ($750), received to our full satisfaction of Winous Point Hunting and Shooting Club, the grantee, do give, grant, bargain, sell and convey unto the said grantees, their heirs and assigns, the following described premises, situated in the township of Bay, county of Ottawa, and state of Ohio, and known as, and being all of section twenty-two (22), in township six (6), range sixteen (16), except that part thereof heretofore conveyed to the Winous Point Shooting Club, and except also twenty acres owned by Adolph Hopfinger, and being the same land conveyed to Charles J. Clarke by Elijah Lattimore and Christina Lattimore by deed dated November 17, 1891, and recorded in the Ottawa county records of deeds, volume 46 and page 320, be the same more or less, but subject to all legal highways.

To have and to hold the above granted and bargained premises, with the appurtenances thereunto belonging, unto the said grantee, their heirs and assigns forever. And we, the said grantors, do for ourselves and our heirs, executors and administrators, covenant with the said grantees, their heirs and assigns, that at and until the ensealing of these presents, we are well seized of the above described premises as a good and indefeasible estate in fee simple, and have good right to bargain and sell the same in manner and form as above written; that the same are free and clear from all encumbrances what-

soever; and that we will warrant and defend said premises, with the appurtenances thereunto belonging, to said grantees, their heirs and assigns, forever, against all lawful claims and demands whatsoever.

And I,the said Louisa S. Clarke, wife of said Charles J. Clarke, do hereby remise, release and forever quitclaim unto the said grantee, and their heirs and asigns, all my right and title of dower in the above described premises.

In witness whereof, we hereunto set our hands and seals the ninth day of November, in the year of our Lord one thousand eight hundred and ninety-two.

CHARLES J. CLARKE (Seal).
LOUISA S. CLARKE (Seal).

Signed, sealed and delivered in presence of

JAMES R. STERRETT,
WALTER S. WILLIAMS,
SAMUEL EDGAR.

The State of Pennsylvania, Allegheny County, ss.

Before me, a notary public in and for said county, personally appeared the above named Charles J. Clarke and Louisa S. Clarke, who acknowledged that they did sign and seal the foregoing instrument, and that the same is their free act and deed.

I further certify, that I did examine the said Louisa S. Clarke separate and apart from her said husband, and did then and there make known to her the contents of the foregoing instrument, and upon that examination she declared that she did voluntarily sign, seal and acknowledge the same, and that she is still satisfied therewith.

In testimony whereof, I have hereunto set my hand and official seal, at Pittsburgh, this 9th day of November, A. D. 1892.

JAMES R. STERRETT,
Notary Public.

Received for record November 17, A. D. 1892.
Recorded this 23d day of November, A. D. 1892.

N. A. CLEMONS,
Recorder Ottawa Co., Ohio.

Plaintiff's Exhibit 26 (E. G.)

MICHAEL DARR TO THE WINOUS POINT SHOOTING CLUB.

(Warranty Deed.)

Know all men by these presents, that I, Michael Darr (unmarried), the grantor, for the consideration of thirteen hundred dollars ($1,300.00), received to my full satisfaction of the Winous Point Shooting Club, the grantee, do give, grant, bargain, sell and convey unto the said grantee, its successors and assigns the following described premises, situated in the township of Bay, county of Ottawa, and state of Ohio, and known as and being the south twenty (20) acres of the east part of the west part of the northwest quarter of section twenty-one (21), township six (6), range sixteen (16), be the same more or less, but subject to all legal highways.

To have and to hold the above granted and bargained premises, with the appurtenances thereunto belonging, unto the said grantee, its successors and assigns forever. And I, the said grantor, do for myself and my heirs, executors and administrators, covenant with the said grantee, its successors

and assigns, that at and until the ensealing of these presents, I am well seized of the above described premises as a good and indefeasible estate in fee simple, and have good right to bargain and sell the same in manner and form as above written; that the same are free and clear from all encumbrances whatsoever; and that I will warrant and defend said premises, with the appurtenances thereunto belonging, to the said grantee, its successors and assigns, forever, against all lawful claims and demands whatsoever.

In witness whereof, I hereunto set my hand and seal, the 11th day of February, in the year of our Lord one thousand eight hundred and ninety-three.

MICHAEL DARR (Seal).

Signed, sealed and delivered in presence of

E. G. LOVE,

J. A. WONNELL.

The State of Ohio, Ottawa County, ss.

Before me, a notary public in and for said county, personally appeared the above named Michael Darr, who acknowledged that he did sign and seal the foregoing instrument, and that the same is his free act and deed.

In testimony whereof, I have hereunto set my hand and official seal, at Port Clinton, Ohio, this 11th day of February, A. D. 1893.

E. J. LOVE,

Notary Public.

Received for record May 15, A. D. 1893.

Recorded this 13th day of June, A. D. 1893.

N. A. CLEMONS,

Recorder Ottawa Co., O.

Plaintiff's Exhibit 27. (E. G.)

A. A. HOPFINGER, ET AL. TO THE WINOUS POINT SHOOTING CLUB.

(Warranty Deed.)

Know all men by these presents that we, A. A. Hopfinger, Agnes C. Hopfinger, Amelia Huber, Sarah Selz, Mary Miller, Victoria Quisno and Victoria Hopfinger, the grantors, for the consideration of two hundred dollars ($200.00), received to our full satisfaction of The Winous Point Shooting Club, the grantee, do give, grant, bargain sell and convey, unto the said grantee, its successors and assigns, the following described premises, situated in the township of Bay, county of Ottawa and state of Ohio, and known as and being the east half of the northeast quarter of the northeast quarter of section twenty-two (22), in township six (6), range sixteen (16), excepting the right to use the north half thereof for pasture for stock by said A. A. Hopfinger and his heirs, be the same more or less, but subject to all legal highways.

To have and to hold the above granted and bargained premises, with the appurtenances thereunto belonging, unto the said grantee, its successors and assigns forever. And we, the said grantors, do for ourselves and our heirs, executors and administrators, covenant with the said grantee, its successors and assigns, that at and until the ensealing of these presents, we are well seized of the above described premises as a good and indefeasible estate in fee simple, and have good right to bargain and sell the same in manner and form as above written; that the same are free and clear from all encumbrances whatsoever.

And that we will warrant and defend said premises, with the appurtenances thereunto belonging, to the said grantee, its successors and assigns, forever, against all lawful claims and demands whatsoever.

And I, the said Agnes C. Hopfinger, wife of said A. A. Hopfinger, do hereby remise, release and forever quitclaim unto the said grantee, and its successors and assigns all my right and title of dower in the above described premises.

In witness whereof, we hereunto set our hands and seals, the 4th day of October, in the year of our Lord one thousand eight hundred and ninety-two.

A. A. Hopfinger (Seal).
Agnes C. Hopfinger (Seal).
Amelia Huber (Seal).
Victoria Quisno (Seal).
Victoria Hopfinger (Seal).
Sarah Selz (Seal).
Mary Miller (Seal).

Signed, sealed and acknowledged in presence of

Thos. J. Marshall,
C. J. Senfert.

Witnesses as to signature of Mary Miller: M. C. Fogarty and C. F. Watts.

The State of Ohio, Lucas County, ss.

Before me, a notary public, in and for said county, personally appeared the above named Mary Miller, who acknowledged that she did sign and seal the foregoing instrument, and that the same is her free act and deed.

In testimony whereof I have hereunto set my hand and official seal at Toledo, this 7th day of October, A. D. 1892.

[Notarial seal.] M. C. Fogarty,
Notary Public, Lucas County, Ohio.

The State of Ohio, Ottawa County, ss.

Before me, a notary public, personally appeared the above named grantors, except Mary Miller, who acknowledged that they did sign and seal the foregoing instrument, and that the same is their free act and deed.

I further certify, that I did examine the said Agnes C. Heplinger, separate and apart from her said husband, and did then and there make known to her the contents of the foregoing instrument, and upon that examination she declared she did voluntarily sign, seal and acknowledge the same, and that she is still satisfied therewith.

In testimony whereof, I have hereunto set my hand and official seal, at Port Clinton, Ohio, this 4th day of October, A. D. 1892.

THOS. J. MARSHALL,
Notary Public.

Received for record, October 25, A. D. 1892.

Recorded this 5th day of November, A. D. 1892.

N. A. CLEMONS,
Recorder, Ottawa County, O.

Plaintiff's Exhibit 28. (E. G.)

JAMES P. LATTIMORE AND WIFE TO THE WINOUS POINT SHOOTING CLUB.

(Warranty Deed.)

Know all men by these presents, that I, James P. Lattimore and Elizabeth A. Lattimore, the grantors, for the consideration of two hundred and fifty dollars ($250), received to our full satisfaction of The Winous Point Shooting Club, the grantee, do give, grant, bargain, sell and convey, unto the said

grantee, its successors and assigns, the following described premises, situated in Bay township, county of Ottawa, and state of Ohio, and known as the south part of the west half of the southwest quarter of the southwest quarter of section number fifteen (15), and the southeast part of the southeast quarter of the southeast quarter of section number sixteen (16), in said township, said parts being bounded and described as follows, viz.: Commencing on the east line of said west half of the southwest quarter of the southwest quarter of section number fifteen (15), at a point fifty-two (52) rods northerly from the southeast corner of said west half, thence southerly to southeast corner, thence westerly along the south line of said section number fifteen (15), and the south line of said section number sixteen (16), ninety-two and thirty-one one hundredths (92 31-100) rods, thence northeasterly to the place of beginning, containing fifteen (15) acres of land, ten and eighteen one hundredths (10 18-100) of which are in section number fifteen (15) and four and eighty-two one hundredths (4 82-100) in section sixteen (16) together with the exclusive right to the said grantee, its successors and assigns and the members thereof of hunting, pursuing and shooting duck, snipe, woodcock and all of the game birds and wild fowls of every kind and description on all lands owned by us or either of us in sections fifteen (15) and sixteen (16) in said Bay township and county of Ottawa, saving and reserving to the said grantor, James P. Lattimore, the right of pasturing said tract of fifteen (15) acres during the natural life of said James P. Lattimore and also reserving to said James P. Lattimore, and his successors the right to shoot on said land owned by him in section fifteen (15) and section sixteen (16).

To have and to hold the above granted and bargained premises, with the appurtenances thereunto belonging, and said

exclusive right unto the said grantee, its successors and assigns forever. And we, the said grantors, do for ourselves and our heirs, executors and administrators, covenant with the said grantee, its successors and assigns, that at and until the ensealing of these presents, we are well seized of the above described premises as a good and indefeasible estate in fee simple, and have good right to bargain and sell the same in manner and form as above written; that the same are free and clear from all encumbrances whatsoever; and that we will warrant and defend said premises, with the appurtenances thereunto belonging to the said grantee, its successors and assigns, forever, against all lawful claims and demands whatsoever.

And I, the said Elizabeth A. Lattimore, wife of said James P. Lattimore, do hereby remise, release and forever quitclaim unto the said grantee, and its successors and assigns all my right and title of dower in the above described premises.

In witness whereof, we hereunto set our hands and seals, the 19th day of March, in the year of our Lord one thousand eight hundred and eighty-six.

J. P. LATTIMORE (Seal).
E. A. LATTIMORE (Seal).

Signed, sealed and delivered in presence of
MINNIE LATTIMORE,
ANDREW J. SCHOERGER.

The State of Ohio, Ottawa County, ss.

Before me, a justice of the peace in and for said county, personally appeared the above named James P. Lattimore and Elizabeth A. Lattimore, who acknowledged that they did sign and seal the foregoing instrument, and that the same is their free act and deed.

I further certify, that I did examine the said wife of said James P. Lattimore separate and apart from her said husband, and did then and there make known to her the contents of the foregoing instrument, and upon that examination she declared that she did voluntarily sign, seal and acknowledge the same, and that she is still satisfied therewith.

In testimony whereof, I have hereunto set my hand and official seal at Port Clinton, this 19th day of March, A. D. 1886.

[Seal.] A. J. SCHOERGER,
Justice of the Peace.

Received March 20, 1886, at 1:40 P. M. Recorded April 9, 1886.

FRED W. CAMPER,
Recorder.

Plaintiff's Exhibit 29. (E. G.)

WARRANTY DEED.

Know all men by these presents, that We, Robert M. Hollinshead and Louisa Hollinshead, husband and wife, the grantors, for the consideration of two thousand dollars ($2,000.00), received to our full satisfaction of Winous Point Shooting Club, the grantee, do give, grant, bargain, sell and convey unto the said grantee, its successors and assigns, the following described premises situated in the counties of Sandusky and Ottawa, state of Ohio, and known as and being an undivided 68-72 of lot number three (3) of the northwest fractional quarter of fractional section twenty-six (26) of township six (6) north, range sixteen (16) east, in Sandusky county, Ohio.

Also an undivided 35-72 of Eagle or Rice Island being part of fractional section twenty-four (24), of township six (6) north, range sixteen (16) east, in Ottawa county, Ohio.

Said lot number three (3), is supposed to contain forty-three and ninety-one one hundredths (43 91-100) acres and said Eagle or Rice Island, is supposed to contain one hundred and thirty-four and forty-two one hundredths (134 42-100) acres all lying and being near the head of Sandusky Bay, and all the right, title and interest of the said grantors both legal and equitable of in and to the above described lot number three (3), and Eagle or Rice Island and each and every part thereof, be the same more or less, but subject to all legal highways.

To have and to hold the above granted and bargained premises, with the appurtenances thereunto belonging, unto the said grantee, its successors and assigns, forever. And we the said grantors, do for ourselves and our heirs, executors and administrators, covenant with the said grantee, its successors and assigns, that at and until the ensealing of these presents, we are well seized of the above described premises as a good and indefeasible estate in fee simple, and have good right to bargain and sell the same in manner and form as above written; that the same are free and clear from all incumbrances whatsoever. And that we will warrant and defend said premises with the appurtenances thereunto belonging, to the said grantee, its successors and assigns forever, against all lawful claims and demands, whatsoever except taxes.

And I, the said Louisa Hollinshead, wife of said Robert M. Hollinshead, do hereby remise, release, and forever quit-claim unto said grantee, and its successors and assigns, all my right and title of dower in the above described premises.

In witness whereof we hereunto set our hands and seals, the 30th day of December, in the year of our Lord, one thousand eight hundred and eighty-seven.

R. M. HOLLINSHEAD (Seal).
LOUISA HOLLINSHEAD (Seal).

Signed, sealed and delivered in presence of

EMMA GOODE.
S. F. ALEXANDER.

The State of Ohio, Ottawa County, ss.

Before me, a notary public, in and for said county, personally appeared the above named Robert M. Hollinshead and Louisa Hollinshead, who acknowledged that they did sign and seal the foregoing instrument, and that the same is their free act and deed.

I further certify, that I did examine the said Louisa Hollinshead separate and apart from her said husband, and did then and there make known to her the contents of the foregoing instrument; and upon that examination she declared that she did voluntarily sign, seal and acknowledge the same, and that she is still satisfied therewith.

In testimony whereof, I have hereunto set my hand and official seal at Port Clinton, this 30th day of December, A. D. 1887.

[Seal.] S. J. ALEXANDER,
Notary Public.

Received February 15, 1888.
Recorded February 20, 1888.

H. J. KRAMB,
Recorder.

Plaintiff's Exhibit 30. (E. G.)

ROBERT M. HOLLINSHEAD AND WIFE TO WINOUS POINT SHOOTING CLUB.

Know all men by these presents, that we, Robert M. Hollinshead and Louisa Hollinshead, husband and wife, the grantors, for the consideration of two thousand dollars ($2,000.00) received to our full satisfaction of Winous Point Shooting Club, the grantee, do give, grant, bargain, sell and convey, unto the said grantee, its successors and assigns, the following described premises, situated in the counties of Sandusky and Ottawa, and state of Ohio, and known as and being an undivided 68-72 of lot number three (3) of the northwest fractional quarter of fractional section twenty-six (26), of township six (6) north, range sixteen(16) east, in Sandusky county, Ohio. Also an undivided 35-72 of Eagle or Rice Island being part of fractional section twenty-four (24), of township six (6) north, range sixteen (16) east, in Ottawa county, Ohio. Said lot number three (3), is supposed to contain forty-three and ninety-one one hundredths (43 91-100) acres and said Eagle or Rice Island is supposed to contain one hundred and thirty-four and forty-one hundredths (134 42-100) acres, all lying and being near the head of Sandusky Bay and all the right, title and interest of the said grantors both legal and equitable of in and to the above described lot number three (3), and Eagle or Rice Island and each and every part thereof, be the same more or less, but subject to all legal highways.

To have and to hold the above granted and bargained premises, with the appurtenances thereunto belonging, unto the said grantee, its successors and assigns forever. And we, the said grantor, do for ourselves and our heirs, executors and administrators, covenant with the said grantee, its successors and assigns, that at and until the ensealing of these presents,

we are well seized of the above described premises as a good and indefeasible estate in fee simple, and have good right to bargain and sell the same in manner and form as above written; that the same are free and clear from all encumbrances whatsoever; and that we will warrant and defend said premises, with the appurtenances thereunto belonging, to the said grantee, its successors and assigns, forever, against all lawful claims and demands whatsoever, except taxes.

And I, Lousia Hollinshead, wife of said Robert M. Hollinshead, do hereby remise, release and forever quitclaim unto the said grantee, and its successors and assigns all my right and title of dower in the above described premises.

In witness whereof, we hereunto set our hands and seals, the 30th day of December, in the year of our Lord one thousand eight hundred and eighty-seven.

R. M. HOLLINSHEAD (Seal).
LOUISA HOLLINSHEAD (Seal).

Signed, sealed and delivered in presence of

EMMA GOODE,
S. P. ALEXANDER.

The State of Ohio, Ottawa County, ss.

Before me, a notary public, in and for said county, personally appeared the above named, Robert M. Hollinshead and Louisa Hollinshead, who acknowledged that they did sign and seal the foregoing instrument, and that the same is their free act and deed.

I further certify, that I did examine the said Louisa Hollinshead separate and apart from her said husband, and did then and there make known to her the contents of the foregoing instrument, and upon that examination she declared that she did voluntarily sign, seal and acknowledge the same, and that she is still satisfied therewith.

In testimony whereof, I have hereunto set my hand and official seal, at Port Clinton, this 30th day of December, A. D., 1887.

[Notarial Seal.] S. P. ALEXANDER,
Notary Public.

Received January 26, 1888.
Recorded February 13, 1888.

FRED W. CAMPER,
Recorder.

Plaintiff's Exhibit 31. (E. G.)

GEORGE B. HELLER AND WIFE TO THE WINOUS POINT SHOOTING CLUB.

(Quitclaim Deed.)

Know all men by these presents, that I, George B. Heller, the grantor, for the consideration of one hundred dollars ($100.00), received to our full satisfaction of The Winous Point Shooting Club, the grantee, do give, grant, bargain, sell and convey unto the said grantee and assigns, the following described premises, situated in the township of Bay, county of Ottawa, and state of Ohio, and known as the undivided one-eighteenth of that part of section 24, township 6, range 16, known as Eagle or Rice Island. Also the undivided one-eighteenth of northwest quarter of northwest quarter of section 26 in same congressional township, in Sandusky county, be the same more or less, but subject to all legal highways.

To have and to hold the above granted and bargained premises, with the appurtenances thereunto belonging, unto the said grantee and assigns forever. And I, the said grantor, do

for myself and my heirs, executors, and administrators, covenant with the said grantee and assigns, that at and until the ensealing of these presents, I was well seized of the above described premises as a good and indefeasible estate in fee simple, and have good right to bargain and sell the same in manner and form as above written; that the same are fr and clear from all encumbrances whatsoever.

And that I, Rhoda B. Heller, wife of said George B. Heller, do hereby remise, release and forever quitclaim unto the said grantee and its assigns, all my right and title of dower in the above described premises.

In witness whereof, we hereunto set our hands and seals the 22nd day of March, in the year of our Lord one thousand eight hundred and eighty-four.

GEO. B. HELLER (Seal).
RHODA B. HELLER (Seal).

Signed, sealed and delivered in presence of

THOS. J. MARSHALL.
E. HENSEN.

The State of Ohio, Ottawa County, ss.

Before me, a notary public in and for said county, personally appeared the above named George B. Heller and Rhoda B. Heller, who acknowledged that they did sign and seal the foregoing instrument, and that the same is their free act and deed.

I further certify, that I did examine the said Rhoda B. Heller separate and apart from her said husband, and did then and there make known to her the contents of the foregoing instrument, and upon that examination she declared that she did voluntarily sign, seal and acknowledge the same, and that she is still satisfied therewith.

In testimony whereof, I have hereunto set my hand and official seal, at Port Clinton, this 22nd day of March, A. D. 1884.

[Notarial Seal.] THOS. J. MARSHALL,
Notary Public.

Received April 5, 1884. Recorded April 30, 1884.
C. C. TRUE,
Recorder.

Plaintiff's Exhibit 32. (E. G.)

WARRANTY DEED.

Know all men by these presents, that I, Thomas Silverwood, of Ottawa county, Ohio, the grantor, in consideration of the sum of one thousand and twenty-five dollars, in hand paid by E. B. Sadler, of Erie county, Ohio, as trustee for Winous Point Club, the grantee, do give, grant, bargain, sell and convey unto the said grantee, his heirs and assigns, the following described premises situated in the township of Riley, county of Sandusky, state of Ohio, and known as being all section 34 in said township, except a strip twenty rods wide off of the south side of the section I heretofore sold and conveyed to Morgan Allen. Also all that part of section number twenty-seven (27), in said township lying south of Sandusky River and west of South Creek, being between thirty and forty acres. The intention is to convey to said Sadler the whole of the land I own in said two sections, although it may cover more than above described.

To have and to hold the above granted and bargained premises, with the appurtenances thereto belonging, unto the said grantee, his heirs and assigns, forever. And I, the said Thomas Silverwood, do for myself and heirs, covenant with

the said grantee, his heirs and assigns, that at and until the ensealing of these presents I am well seized of the premises as a good and indefeasible estate in fee simple, and have good right to bargain and sell the same in manner and form as above written; that the same are free from all incumbrances whatsoever.

And will warrant and defend said premises with the appurtenances thereunto belonging, to the said grantee, his heirs and assigns, forever, against all lawful claims and demands, whatsoever.

In witness whereof I have hereunto set my hand and seal, the 17th day of May, in the year of our Lord, one thousand eight hundred and sixty-seven.

THOMAS SILVERWOOD (Seal).

Signed, sealed and delivered in presence of

WM. B. SLOAN,
WM. DEHEN.

The State of Ohio, Ottawa County, ss.

Before me, a notary public, in and for said county, personally apeared Thomas Silverwood, the maker of the above deed, and acknowledged that he did sign and seal the foregoing instrument, and that the same is his free act and deed.

In testimony whereof, I have hereunto set my hand and notarial seal this 7th day of May, A. D. 1867.

[Seal.] WM. B. SLOAN,
Notary Public.

Received June 19, 1867. Recorded July 22, 1867.
A. F. GALLAGHER,
Recorder.

The above is stamped with $1.50 in stamps cancelled.

Plaintiff's Exhibit 33. (E. G.)

WM. C. PROCTOR AND WIFE TO WINOUS POINT HUNTING AND SHOOTING CLUB.

(Warranty Deed.)

Know all men by these presents, that we, Wm. Cooper Proctor and Jane Eliza Proctor, the grantors, for the consideration of seven hundred and fifty dollars ($750.00), received to our full satisfaction of Winous Point Hunting and Shooting Club, the grantees, do give, grant, bargain, sell and convey unto the said grantees, ther heirs and assigns, the following described premises, situated in the township of Bay, county of Ottawa, and state of Ohio, and known as and being all of section twenty-two (22), in township six (6), range sixteen (16), except that part thereof heretofore conveyed to the Winous Point Shooting Club and except also twenty acres owned by Adolph Hopfinger and being the same land conveyed to Wm. Cooper Proctor by Elijah Lattimore and Christina Lattimore by deed dated November 17, 1891, and recorded in the Ottawa County Records of Deeds, Volume 46, Page 320, be the same more or less, but subject to all legal highways.

To have and to hold the above granted and bargained premises, with the appurtenances thereunto belonging, unto the said grantees, their heirs and assigns forever. And we, the said grantors, do for ourselves and our heirs, executors and administrators, covenant with the said grantees, their heirs and assigns, that at and until the ensealing of these presents, we are well seized of the above described premises as a good and indefeasible estate in fee simple, and have good right to bargain and sell the same in manner and form as above written: that the same are free and clear from all encumbrances whatsoever; and that we will warrant and defend

said premises, with the appurtenances thereunto belonging, to the said grantees, their heirs and assigns, forever, against all lawful claims and demands whatsoever.

And I, the said Jane Eliza Proctor, wife of said Wm. Cooper Proctor, do hereby remise, release and forever quit-claim unto the said grantees, and their heirs and assigns, all my right and title of dower in the above described premises.

In witness whereof, we hereunto set our hands and seals, the — day of — in the year of our Lord one thousand eight hundred and ninety-two.

WM. COOPER PROCTOR (Seal).
JANE ELIZA PROCTOR (Seal).

Signed, sealed and delivered in presence of
MARY H. JOHNSTON,
I. H. JOHNSTON.

The State of Ohio, Hamilton County, ss.

Before me, a notary public, in and for said county, personally appeared the above named Wm. Cooper Proctor and Jane Eliza Proctor, who acknowledged that they did sign and seal the foregoing instrument, and that the same is their free act and deed.

In testimony whereof, I have hereunto set my hand and official seal, at Glendale, this 15th day of November, A. D., 1892.

[Notarial Seal.] HENRY B. MCCLURE,
Notary Public, Hamilton County, Ohio.

Received for record January 19, A. D., 1893.
Recorded this 10th day of February, A. D., 1893.
N. A. CLEMONS,
Recorder, Ottawa County, Ohio.

Plaintiff's Exhibit 34. (E. G.)

A. A. HOPFINGER TO THE WINOUS POINT SHOOTING CLUB.

(Quitclaim Deed.)

Know all men by these presents, that I, A. A. Hopfinger, the grantor, for divers good causes and considerations thereunto moving, and especially for the sum of one dollar ($1.00), received to full satisfaction of The Winous Point Shooting Club, the grantee, have given, granted, remised, released and forever quitclaimed, and do by these presents absolutely give, grant, remise, release and forever quitclaim unto the said grantee, its successors, heirs and assigns forever, all such right and title as I the said grantor have or ought to have, in and to the following described piece or parcel of land:

Situated in the township of Bay, county of Ottawa, and state of Ohio, and known as and being the east half of the northeast quarter of the northeast quarter of section twenty-two (22), township six (6), range sixteen (16).

To have and to hold the premises aforesaid with the appurtenances thereunto belonging unto the said grantee, its successors and assigns, so that neither I, the said grantor, nor my heirs, nor any other person claiming title through or under me shall or will hereafter claim or demand any right or title to the premises, or any part thereof; but they and every one of them shall, by these presents, be excluded and forever barred.

In witness whereof, I hereunto set my hand and seal the 25th day of October in the year of our Lord one thousand eight hundred and ninety-two.

A. A. HOPFINGER (Seal).

Signed, sealed and delivered in presence of

E. G. LOVE,

JOHN FRITZGOROLD,

The State of Ohio, Ottawa County, ss.

Before me, a notary public, in and for said county, personally appeared the above named, A. A. Hopfinger, who acknowledged, that he did sign and seal the foregoing instrument, and that the same is his free act and deed

In testimony whereof, I have hereunto set my hand and official seal, at Port Clinton this 25th day of October, A. D., 1892.

[Seal.] E. G. LOVE,
Notary Public.

Received for record October 25, A. D. 1892, at 2:20 o'clock P. M.

Recorded this 5th day of November, A. D., 1892.

N. A. CLEMONS,
Recorder, Ottawa County, Ohio.

Plaintiff's Exhibit 35. (E. G.)

ELIJAH LATTIMORE AND WIFE TO THE WINOUS POINT SHOOTING CLUB.

(Warranty Deed.)

Know all men by these presents, that we, Elijah Lattimore and Christina Lattimore, the grantors, for the consideration of three hundred and fifty dollars ($350.00), received to our full satisfaction of The Winous Point Shooting Club, the grantee, do give, grant, bargain, sell and convey, unto the said grantee its successors, heirs and assigns, the following described premises, situated in Bay township, county of Ottawa, and state of Ohio, and known as the south part of the east half of the southwest quarter of the southwest quarter of sec-

tion No. fifteen (15), in said township: Said south part being bounded and described as follows, viz: Commencing at the southeast corner of said southwest quarter of said southwest quarter of section No. fifteen (15), thence westerly along the south line of said section forty (40) rods, thence northerly parallel with the west line of said section fifty-two (52) rods, thence northeasterly to a point eighty-four (84) rods, northerly from the place of beginning, and in the east line of the said southwest quarter of said southwest quarter, thence southerly along said east line to the place of beginning, containing seventeen (17) acres of land together with the exclusive right to the said grantee, its successors and assigns, and to the members thereof, of hunting, pursuing and shooting ducks, snipe, woodcock and all other game birds, and wild fowls of every kind and description on all lands owned by us or either of us in sections fifteen (15) and twenty-two (22), in said Bay township and county of Ottawa, saving and reserving to the said grantor, Elijah Lattimore, the right of pasturing said tract of seventeen (17) acres during the natural life of said Elijah Lattimore, and also reserving to said Elijah Lattimore and his successors the right to shoot on said land owned by me in sections No. fifteen (15) and twenty-two (22).

To have and to hold the above granted and bargained premises, with the appurtenances thereunto belonging, and said exclusive right unto the said grantee, its successors and assigns forever. And we, the said grantors, do for ourselves and our heirs, executors and administrators, covenant with the said grantee, its successors and assigns, that at and until the ensealing of these presents, we are well seized of the above described premises as a good and indefeasible estate in fee simple, and have good right to bargain and sell the same in

manner and form as above written: that the same are free and clear from all encumbrances whatsoever: and that we will warrant and defend said premises, with the appurtenances thereunto belonging, to the said grantee, its successors and assigns, forever, against all claims and demands whatsoever.

And I, the said Christina Lattimore, wife of said Elijah Lattimore, do hereby remise, release and forever quitclaim unto the said grantee, and its successors and assigns all my right and title of dower in the above described premises.

In witness whereof, we hereunto set our hands and seals, the eighteenth day of March, in the year of our Lord one thousand eight hundred and eighty-six.

ELIJAH LATTIMORE (Seal).
CHRISTINA LATTIMORE (Seal).

Signed, sealed and delivered in presence of

E. G. GARDNER,
J. P. LATTIMORE.

The State of Ohio, Ottawa County, ss.

Before me, a justice of the peace, in and for said county, personally appeared the above named, Elijah Lattimore and Christina Lattimore, who acknowledged that they did sign and seal the foregoing instrument, and that the same is their free act and deed.

I further certify, that I did examine the said Christina Lattimore, wife of said Elijah Lattimore, separate and apart from her husband, and did then and there make known to her the contents of the foregoing instrument, and upon that examination she declared that she did voluntarily sign, seal and acknowledge the same, and that she is still satisfied therewith.

In testimony whereof, I have hereunto set my hand and official seal, at Port Clinton, this eighteenth day of March. A. D., 1886.

J. P. LATTIMORE.
Justice Peace.

Received for record March 20, 1886, at 1:40 P. M.
Recorded April 8, 1886.

FRED W. CAMPER,
Recorder.

Plaintiff's Exhibit 36. (E. G.)

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THE STATE OF OHIO, }
City of Columbus. }

In the Supreme Court of Ohio.

To the honorable the Supreme Court of the United States:

Pursuant to the command of your within writ of error, directed to us, we, under our seal, distinctly and openly, the record and proceedings within mentioned, with all things concerning the same, before the judges within named in a certain authenticated transcript to this writ attached, send, as within we are commanded.

In witness whereof, I, Lawson E. Emerson, clerk of the supreme court of Ohio, have set my hand and seal of said court, this 21st day of October, A. D. 1902.

[Seal of the Supreme Court of the State of Ohio.]

LAWSON E. EMERSON,
Clerk Supreme Court of Ohio,
By J. G. OBERMEYRE, *Deputy.*

In the Supreme Court of Ohio.

THE WINOUS POINT SHOOTING CLUB,
Plaintiff in Error,
vs.
JEPPE CASPERSEN, PETER PETERSEN, WM. DECKER, and CHARLES PETERSEN, Defendants in Error.
} No. 7167. Petition in Error.

The Winous Point Shooting Club, plaintiff in error, considering itself aggrieved by the final decision of the supreme court of Ohio in rendering judgment against it in the above-entitled action, hereby prays a writ of error from the said decision and judgment to the Supreme Court of the United States. It attaches hereto its assignment of error.

GOULDER, HOLDING & MASTEN,
Attorneys for Plaintiff in Error.

STATE OF OHIO, }
Supreme Court, } *ss:*

Let the writ of error be issued as prayed for upon the execution of a bond by the Winous Point Shooting Club in the sum of five hundred dollars ($500).

Oct. 6", 1902.

JACOB F. BURKET,
Chief Justice of the Supreme Court of Ohio.

In the Supreme Court of Ohio.

THE WINOUS POINT SHOOTING CLUB, Plaintiff in Error, *vs.* JEPPE CASPERSEN, PETER PETERSEN, Wm. Decker, and Charles Petersen, Defendants in Error.	No. 7167. Assignments of Error.

Now comes The Winous Point Shooting Club, plaintiff in error, and files herewith its petition for a writ of error, and says there are errors in the record and proceedings of the above-entitled case, and, for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignments of error:

Plaintiff in error says that action was brought to enjoin defendants in error from fishing in the Sandusky river and Muddy creek (known as Mud creek), where said streams pass through its property, claiming to be the owner of both banks of said streams at the places mentioned and described, and as such riparian proprietor to be the owner of the beds of said streams and to have the exclusive right of fishing therein at said places.

Defendants in error asserted that said waters were public; that the public had the right of fishing therein and that they were exercising a public right.

Plaintiff in error further averred that the lands claimed by it had been in its possession and it had exercised control and proprietorship over said lands and waters for many years prior to the commencement of said action; that said waters were meandered as those of Sandusky river and Muddy creek, and said lands were surveyed in *in* 1820 by the Government of the United States under and by virtue of and in conformity with the provisions of an act of Congress passed May 18, 1796 (1 U. S. St. at L., 464), entitled, "An act for providing for the sale of lands of the United States in the territory northwest of the River Ohio and above the mouth of Kentucky river."

And also under authority of and in conformity with the provisions of an act of Congress supplementary thereto, passed February 11, 1805 (2 U. S. St. at L., 313), entitled, "An act concerning the mode of survey of the public lands of the United States."

At the time of said survey in 1820, the said lands bordering upon said streams were the public domain of the United States.

The first act provided, among other things, that

"Every surveyor shall note in his field book the true situations "of * * * all water-courses, over which the line he runs shall

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"pass; and also the quality of the lands. These field books shall "be returned to the surveyor general, who shall therefrom cause a "description of the whole lands surveyed to be made out and trans- "mitted to the officers who may superintend the sales: he shall "also cause a fair plat to be made of the townships, and fractional "parts of townships, contained in the said lands, describing the sub- "divisions thereof, and the marks of the corners. This plat shall be "recorded in books to be kept for that purpose; a copy thereof shall "be kept open at the surveyor general's office, for public informa- "tion; and other copies sent to the places of the sale, and to the "Secretary of the Treasury."

The Government engineer (Sylvanus Bourne), in conformity with the provisions of said acts, surveyed sections 13, 14, 15, 16, 20, 21, 22, 23 and 24, now situate in Ottawa county, Ohio, and sections 25, 26, 27, 28, 34 and 35, now situate in Sandusky county, Ohio; and he meandered the waters lying between the sections now situate in Ottawa and Sandusky counties as Sandusky river and Muddy creek, and located the mouths of the Sandusky river. Between the two mouths of said river, as so fixed by said survey, he surveyed an island, now called "Eagle island," as part of section 24 and containing 134.42 acres of land; and he located Sandusky bay east of said Eagle island.

Said surveyor noted in his field books the true situations of these water-courses, and said books were turned over to the surveyor general of the United States, and plats were made by said engineer of said townships, sections and water-courses, and copies of said plats for many years have been filed with the surveyors of said Ottawa and Sandusky counties, which officers are the proper custodians of such documents under the statutes of Ohio.

Said lands were patented or granted by the Government to the predecessors in title of the Winous Point Shooting Club as lands bordering upon the Sandusky river and Muddy creek as fixed by said survey, and have been owned and occupied by it for many years under and by virtue of said grants, and are still so owned and occupied.

In 1828 the supreme court of Ohio decided that a person owning lands upon both banks of the Sandusky river owns the entire river, subject only to the easement of navigation, and that a person owning land upon one bank owns to the middle of the river, subject to the same easement, and that the public have not the right of fishing in said river, but such right is exclusive in the riparian proprietor. This decision has been ever since followed by the supreme court of Ohio, and such is the rule of property in Ohio, and has been since 1828.

The supreme court of Ohio has further established the law that riparian rights are property within the purview of section 19 of the bill of rights of Ohio, of which rights the owner cannot be deprived without just compensation.

The plaintiff is the owner of the lands on both banks of the Sandusky river and Muddy creek, as meandered in said Government survey of 1820, and claims the exclusive right of fishing therein. In 1894 defendants set up a claim of right to fish, as members of the public, in the waters surveyed and meandered by the United States as those of Sandusky river and Muddy creek, and without the consent of plaintiff, and against its protest and prohibition, fished in said waters, with nets, seines and other devices.

Whereupon plaintiff brought the action aforesaid to enjoin and restrain them from fishing in said waters. Thereupon the circuit court in and for the county of Ottawa, upon a full hearing of all the facts, and in compliance with the statutes of Ohio in such cases made and provided, separately stated its findings of fact and conclusions of law.

As findings of fact, said court held that under and by virtue of the acts of Congress passed May 18, 1796, and February 11, 1805, aforesaid, a survey was made by the United States of the lands and marshes described in the petition of plaintiff, which were divided into the townships and sections aforesaid, and said waters were meandered and described in the field-notes as Sandusky river and Muddy creek; and, in further compliance with said acts, a plat of said survey was made by the Government engineer and is on file in the offices of the surveyors of Ottawa and Sandusky counties, Ohio.

Said court made the further finding of fact that at and for many years prior to the commencement of the action plaintiff was the owner of the lands, marshes and shores of which it claimed to be the owner, and which were described and comprised in the sections and fractional sections of said Government survey and map, and as such owner is still in actual possession thereof.

Said court also made the finding of fact that all of said lands and marshes were acquired from the United States either directly through patents given to plaintiff's predecessors in title, or indirectly from the State of Ohio through and by virtue of an act of Congress known as the "swamp lands act." (Passed September 28, 1850.)

Said court further found that much of the land and marsh surveyed and platted by the Government as such has since been overflowed.

It made the further finding of fact that Sandusky river and Muddy creek are situate as located in said Government survey, as follows:

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"'Sandusky river' is a much larger stream than Mud creek, and "is navigable in its channel as far up as Fremont, a distance of "about twenty miles. It has an average depth of twelve feet in its "main channel, and is navigated by vessels engaged in commerce "which draw less water. This channel is a natural one and the "Government on a number of occasions has dredged it near the east "end of Eagle island, where a bar forms. Between Squaw island "and Eagle island the Government has marked the course of the "channel with buoys for purposes of navigation. About where the "river enters the southwest quarter of section 28 its banks become "low and marshy, and, when it reaches a point at or near Squaw "island in section 27, the waters of the river spread out into a wider "expanse of water and the channel banks do not appear above the "water from that point to Sandusky bay, except when the water is "very low, at which time the channel banks are in part exposed. "The expanse of water on either side of the channel of the river be-"low Squaw island and below its junction with Mud creek has a "depth in its deepest place of about four and a half to six feet near "the channel bank and shoals uniformly from those places to the "shores, except in what is known as the middle ground, in which "the water is of much less depth. When these waters were mean-"dered by Sylvanus Bourne, in 1820, as aforesaid, part of that portion "of the territory which is now covered with water on either side of "the river channel was marsh land.

"During the season of vegetation, from the latter part of May or "first of June until late in October, the channel is marked all the "way from the place where the channel banks become low, as afore-"said, to the east end of Eagle island, by the growth of aquatic "vegetation, which grows upon the channel banks and in the shoal "water between them and the dry shores. No aquatic vegetation "grows in the channel of the river. The channel may be traced at "all seasons of the year by the current. The channel bank is, for "the greater part of the way east of its junction with the current "from Mud creek, distinct and abrupt. These shoals, outside of the "channel, in seasons of vegetation are in part covered with dense "masses of aquatic vegetation, so thick in many places that only "small, flat-bottomed boats, drawing a few inches of water, can be "floated thereover when propelled by the laborious method of punt-"ing. Other small boats in many places cannot navigate the waters "of these shoals because of the density of this vegetation.

"Commencing at the point where the channel banks of the San-"dusky river become submerged as aforesaid, the channel and cur-"rent of the river run in a northerly direction between Squaw island

" on the west, and Peach island, and the Middle Ground on the east,
" and just as it passes the Middle Ground the aforesaid channel of
" Mud creek is connected with the channel of the river. At this
" point the river turns sharply to the east and runs along the north-
" ern margin of the Middle Ground until it reaches a point between
" Canvas Back point on the north and the west end of Eagle island
" on the south, where the channel separates into two channels, one of
" which turns and flows northeasterly and empties into the San-
" dusky bay between Slade's or Slate's point on the north and the
" east end of Eagle island on the south. The other channel turns
" and runs southeasterly from point of separation along the easterly
" margin of the Middle Ground and empties into Sandusky bay be-
" tween the east or near the east end of Eagle island on the north
" and South point on the south. The north channel is what is
" known as the main channel. It is in this channel that the Gov-
" ernment has placed its buoys and at the mouth of which it has
" done its dredging. The south channel has a depth of five or six
" feet and can be navigated by water craft drawing less than that
" depth of water. The channel of the river from the point where it
" is joined by Mud creek has a width of about six hundred feet."

" The expanse of water on either side of the channel of the San-
" dusky river, below Squaw island, and also the expanse of water on
" either side of the channel from said junction west through Mud
" Creek bay, has a depth varying from one foot to six feet and shoals
" to the shores. A part of this expanse of water is a channel known
" as 'Cape Island channel,' between the Middle Ground and Cape
" island on the north and Peach island on the south, through which,
" when the water is at a high stage, a portion of the waters coming
" down the Sandusky river leave the main channel and flow east-
" ward, and rejoin the waters of the channel again at or near its
" southern mouth and thence empties into Sandusky bay. This
" channel is only three or four feet deep at an ordinary stage of
" water, and in summer and autumn is covered with reeds, rushes
" and other lowland vegetation, so that small boats cannot move
" through it except by poling or punting.

" Between Squaw island and the adjacent land on the west is a
" channel which at first was an artificial channel, as before men-
" tioned, but which has been enlarged by the action of the water to
" a considerable width and to a depth of four or five feet, through
" which some of the waters of the Sandusky river pass into Mud
" Creek bay, and thence join again the main channel of the river,
" but the main body of the water united with South creek near Peach
" island and Squaw island, retains its current and flow and follows
" the channel to its mouth in the Sandusky bay."

"At and beyond the northeastmost mouth of said Sandusky River "channel is a bar, formed by the deposits from the waters of the "river as they mingle with the waters of Sandusky bay. The chan-"nel has been kept open through this bar by dredging at different "times. The channels of said Mud creek and Sandusky river are "always clear of vegetation and in summer months and early "autumn their limits are defined by the rushes, reeds and other "aquatic vegetation, which grow more or less over all the other por-"tions of these waters.

"*But in the spring of the year all that territory from Squaw* "island on the south and Horseshoe island on the west, eastward out "to Lake Erie, except the island, points of land and middle ground "herein described, is open water, except as affected outside said "channels more or less by aquatic vegetation."

"'Muddy creek' or 'Mud creek' is a small stream which rises "many miles west and flows in a northeasterly direction, and for "several miles upstream from its mouth it is navigable for ordinary-"sized water craft drawing from three to four feet of water. When "said Mud creek reaches the northeast quarter of section 29, west "of section 28, it opens out into a wider expanse of water called Mud "Creek bay, which is about one and one-fourth miles long east to "west, and in width varies from about one mile to about one-half a "mile, except at Bixler's point, where it is much narrower. The "course of Mud creek is defined by banks until it reaches the north-"east quarter of said section 29, where it enters the wide water "aforesaid, and from there downward in its course there are no "banks except the shore line of the so-called Mud Creek bay, but "there is a channel to this Mud creek leading easterly through the "so-called Mud Creek bay, which is deeper than the water on either "side, and which is wide enough for the passage of ordinary water "craft drawing from three to five feet, out to a point a little east of "a line from Squaw island to Winous point, where it empties into "another channel hereinafter mentioned. The channel of Mud "creek through Mud Creek bay has a depth of from five to seven "feet, and from each way the water along most of the shore shoals "to a depth of a foot or less near the shores which are low and "marshy, but in some places the water is from three to four feet "deep near the shore. Boats drawing not to exceed three to five "feet, at a good stage of water, can pass over the waters of this Mud "Creek bay outside of this channel, for varying distances therefrom, "and in the spring season of each year there is nothing to indicate "this channel in Mud Creek bay, but from June until about the "first of October eel grass and other aquatic vegetation comes up to

"the surface of the water and marks distinctly the channel and "current caused by the flow of the water of Mud creek downward "through this wide expanse of water to the point above referred to, "until such vegetation is cut down by frost and carried away by "ice."

It also found as matter of fact that a body of water locally known as Mud Creek bay is the water of Mud creek which has spread over the marsh lands in said survey mentioned and has been given that local name, as follows:

"'Mud Creek bay' is that body of water lying west of a line "drawn from Winous point to Squaw island. 'Mud Creek bay' is "a local name given to a portion of the waters of Mud creek which "have spread over and, together with waters coming from the north "and south marshes, have submerged and overflowed the lowlands "contiguous to its channel. It was not mentioned in the Govern- "ment survey of 1820, made by Bo-rne, but is there designated as "Muddy creek. At that time the lands contiguous to Muddy creek "were generally marsh lands, part of which have been submerged "since by the action of the water, and the waters over these lands "then and since submerged make what is locally called 'Mud Creek "bay.' The water in it varies at its ordinary stage from six inches "to four or five feet in its deepest place, except in the channel of "Mud creek, which flows through it, which varies in depth from "five to seven feet. During the season of vegetation, from the first "of June to the latter part of October, a large part of it is covered "with aquatic vegetation, some of which grows three or four feet "above the water, and some of which lies upon the surface of the "water. This aquatic vegetation is composed of reeds, flag grass, "bulrushes, deer tongue, arrow head, lily pads, eel grass and wild "celery. A large part of it cannot be used by boats at any season "except by those which draw less than two to three feet, and is only "used by fishing skiffs, pound-boats and gunning canoes. During "the season of vegetation, in many places, it is impossible to get a "canoe, rowboat or other kind of boat over many parts of it, except "by the laborious method of punting."

It further found as matter of fact the present location of the island between the mouths of the Sandusky river as located in said Government survey as follows:

"'Eagle island' is situated in section 24, and is entirely sur- "rounded by water, and, as surveyed by the United States Govern- "ment in 1820, contained about 135 acres, but the island has been "washed away and now contains about three acres, and is situated "near the center of the south half of said section 24. The part of "said 135 acres submerged is traceable by aquatic vegetation."

Plaintiff says that it became and was the duty of said court to render judgment in conformance to said findings of fact, but that it erroneously and contrary to its findings of fact, made the following conclusion of law, and upon said conclusion of law rendered its judgment and decree:

"That all those waters lying west of a line drawn from Slade's "point or Slate's point, to a point at the east end of Eagle island "and thence to South point, and between Squaw island on the south, "Horse Shoe island on the west and the shore line on the north, and "lying between the shores aforesaid, form part of a public bay, and "are not parts of the Sandusky river and Mud creek; and being "parts of an open bay, and navigable in part as aforesaid, the de-"fendants as members of the public have the right of navigation "and fishing in said waters. But the defendants and the public "have no right in or upon any of said lands not covered by water "to an extent that marketable fish may be found therein."

Plaintiff in error further says that by said judgment and decree said court set aside and held for naught the survey of the Government of the United States, wherein the true situation of said water-courses and the location of said lands with respect thereto was determined, and took away from plaintiff its property and property rights for public use without just compensation, as guaranteed by article V of amendments to the Constitution of the United States.

That thereupon plaintiff, in compliance with the statutes of Ohio, filed its petition in error in the supreme court of Ohio and averred that in and by said judgment of the circuit court the private property of the plaintiff was taken for public use without just compensation, in contravention of the Constitution of the United States; that said supreme court erroneously approved and affirmed said judgment in all respects.

Plaintiff says that the true situation of Sandusky river and Muddy creek as fixed, located and declared in said survey, field-notes and plat made by the Government under authority of the aforesaid acts of Congress was binding and conclusive upon the courts of Ohio, and the supreme court erred in determining that the Sandusky river and Muddy creek were not situate and located as determined and declared by the United States in its surveys, field-notes and plats as aforesaid.

That the rule of property so established by the supreme court of Ohio in 1828 and which has ever since been maintained, that the owner of both banks of rivers and water-courses in said State is the owner of the beds of said streams and has the exclusive right of fishing therein, vested the title to the beds of said river and creek

in the plaintiff, subject only to the easement of navigation in the navigable waters thereof. That said exclusive right of fishing in said streams was a vested right of property within the protection of the Constitution of the United States, and the supreme court of Ohio erred in its judgment and decree, which deprived plaintiff of said right and gave to the public the right of fishing therein without just compensation to plaintiff.

Wherefore, plaintiff in error prays that the judgment and decree of the supreme court of Ohio be reversed, and that this honorable court will enter a judgment and decree enjoining defendants in error from fishing, setting, placing and drawing seines, fish-nets and other devices for catching fish, turtles, frogs and other game in said waters, and for such other and further relief in the premises as equity and good conscience may require.

S. H. HOLDING,
Attorney for Plaintiff in Error.

HARVEY D. GOULDER,
FRANK S. MASTEN,
Of Counsel.

[Endorsed:] No. 7167. In the supreme court of Ohio. The Winous Point Shooting Club, plaintiff in error, *vs.* Jeppe Caspersen, Peter Petersen, Wm. Decker and Charles Petersen, defendants in error. Petition in error and assignments of error. Filed Oct. 7, 1902 in supreme court of Ohio. L. E. Emerson, clerk. Goulder, Holding & Masten, attorneys for plaintiff in error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Ohio before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Winous Point Shooting Club, plaintiff and plaintiff in error, and Jeppe Caspersen, Peter Petersen, Wm. Decker and Charles Petersen, defendants and defendants in error wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their va-

lidity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said The Winous Point Shooting Club, plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within — days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eighth day of October, in the year of our Lord one thousand nine hundred and two

[Seal of the Circuit Court, Northern Dist. of Ohio.]

IRVIN BELFORD,
Clerk of the Circuit Court of the United States, Northern District of Ohio.

Allowed by
JACOB F. BURKET,
Chief Justice of the Supreme Court of Ohio.

[Endorsed:] Filed Oct. 9—1902 in supreme court of Ohio. L. E. Emerson, clerk.

UNITED STATES OF AMERICA, ss:

To Jeppe Caspersen, Peter Petersen, Wm. Decker, and Charles Petersen, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of Ohio, wherein The Winous Point Shooting Club is plaintiff in error and you are defendants in error,

to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Jacob F. Burket, chief justice of the supreme court of the State of Ohio, this 8th day of October, in the year of our Lord one thousand nine hundred and two.

JACOB F. BURKET,
Chief Justice of the Supreme Court of Ohio.

THE UNITED STATES OF AMERICA, }
Northern District of Ohio, Lucas Co., } *ss:*

U. S. Marshal's Return.

On this 11th day of October, in the year of our Lord one thousand nine hundred and two, personally appeared before me, the subscriber, Deputy U. S. Marshal B. J. Wagner and makes oath that he delivered a true copy of the within citation to George A. True, personally at Port Clinton, O., said George A. True being the attorney of record of the within-named defendants.

B. J. WAGNER.

Sworn to and subscribed the 11th day of October, A. D. 1902.

[Notarial Seal, Lucas County, O.]

EDWARD M. MAUSAY,
Notary Public.

Fees.

Service	$2.00
Travel	2.46
Copy	.40
Total	$4.86

Paid by S. H. Holding, Esq.

U. S. Marshal's No. 1468.

Know all men by these presents, that we, The Winous Point Shooting Club, as principal, and Charles F. Brush and John H. McBride, as sureties, are held and firmly bound unto Jeppe Caspersen, Peter Petersen, Wm. Decker and Charles Petersen, defendants herein named, in the full and just sum of five hundred dollars, to be paid to the said Jeppe Caspersen, Peter Petersen, Wm. Decker and Charles

Petersen, their certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this third day of October, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a session of the supreme court of Ohio in a suit depending in said court, between The Winous Point Shooting Club, plaintiff in error, and Jeppe Caspersen, Peter Petersen, Wm. Decker and Charles Petersen, defendants in error, a judgment and decree was rendered against the said The Winous Point Shooting Club and the said The Winous Point Shooting Club having obtained writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Jeppe Caspersen, Peter Petersen, Wm. Decker and Charles Petersen citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within — days from the date thereof.

Now, the condition of the above obligation is such, that if the said The Winous Point Shooting Club shall prosecute said proceeding to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE WINOUS POINT SHOOTING CLUB, [SEAL.]
By C. F. BRUSH, *Pres.* [SEAL.]
CHARLES F. BRUSH. [SEAL.]
JOHN H. McBRIDE. [SEAL.]

Sealed and delivered in presence of—
S. H. HOLDING.
MARK A. COPELAND.

Approved by—
JACOB F. BURKET,
Chief Justice of the Supreme Court of Ohio.

The sureties on the within bond are amply responsible.
IRVIN BELFORD, *Clerk*,
By JNO. VAN NOSTRAN, *Deputy*.

[Endorsed:] Filed Oct. 7—1902 in supreme court of Ohio. L. E. Emerson, clerk.

Certified Transcript of Docket and Journal Entries.

THE STATE OF OHIO, } ss:
City of Columbus, }

In the Supreme Court of Ohio, January Term, A. D. 1902.

In the record and proceedings then and there had and held, among other things, is the following, to wit:

THE WINOUS POINT SHOOTING CLUB,
Plaintiff in Error,
vs.
JEPPE CASPERSEN, PETER PETERSEN, William Decker, and Charles Petersen, Defendants in Error.

No. 7167. Error to the Circuit Court of Ottawa County.

June 30, 1900. Petition in error & waiver of summons filed.
" " " Circuit court transcript filed.
" " " Original papers, bill of exceptions & exhibits filed.
" " " All papers except maps & photos, taken by G., H. & M.
July 11, " Motion by plaintiff to dispense with reproduction of photographs and maps, and notice, filed.
" 26, " Bill of exceptions returned.
" " " Original papers returned.
" 27, " Printed record filed.
Aug. 1, " Proof of service of printed record filed.
Sept. 6, " Receipted bill for printing record filed. ($184.05.)
Oct. 4, " Brief of plaintiff on motion filed.
Oct. 9, " Journal entry:
"Motion by plaintiff to dispense with reproduction of photographs and maps in cause No. 7167 on the general docket."
Ordered by the court, that said motion be and the same is hereby sustained. O. B. No. 17, page 253.
Dec. 31, " Plaintiff's printed brief filed.
Jan. 3, 1901. Proof of service of plaintiff's printed brief filed.
Feb. 20, " Defendants' printed brief filed.
" 25, " Proof of service of defendants' printed brief filed.
Dec. 17, " Motion to amend petition in error, notice and plaintiff's typewritten brief on motion filed.
" 20, " Journal entry:

"Motion by plaintiff to amend petition in error in cause No. 7167 on the general docket."

Ordered by the court that said motion be and the same is hereby allowed. O. B. No. 18, page 118.

Dec. 21, 1901. Amendment to petition in error filed.

Jan. 2, 1902. Printed amendment to petition in error filed.

" 4, " Proof of service of printed amendment filed.

June 17, " Journal entry:

This cause came on to be heard upon the transcript of the record of the circuit court of Ottawa county, and was argued by counsel. On consideration whereof, it is ordered and adjudged that the judgment of the said circuit court be, and the same is hereby, affirmed; and it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein.

It is further ordered that the defendants in error recover from the plaintiff in error their costs expended herein, taxed at $—.

Ordered, that a special mandate be sent the circuit court of Ottawa county, to carry this judgment into execution. O. B. No. 18, page 311.

June 24, 1902. Mandate issued.

Sept. 30, " Journal entry:

On motion of said plaintiff in error, The Winous Point Shooting Club, this court, in addition to the orders heretofore made herein, orders it to be certified and made a part of the record in this case and of the judgment and entry of affirmance heretofore rendered and made herein, that in the prosecution of error to this court from the circuit court of Ottawa county, and in the arguments made in this court, in behalf of plaintiff in error, it was insisted and relied upon by said plaintiff that the waters in dispute had been surveyed and meandered by the United States as those of Sandusky river and Muddy creek, and the lands mentioned and described in said case had been surveyed, sold and patented by the United States to plaintiff's predecessors in title as lands bordering upon said river and creek, all of which acts had been done under authority of acts of Congress; that plaintiff had and possessed the sole and

exclusive right of fishing in said waters; that the judgment and decree of the said circuit court that said waters are not those of Sandusky river and Muddy creek, but those of an open and public bay, in which the public had the rights of fishing, was in contravention of the Constitution of the United States, in that plaintiff was deprived of its private property and the same was taken for a public use, without just compensation to it; and it became material to the determination of said case in this court, to determine said question so made by plaintiff in error, which was determined adversely to plaintiff in error, as appears in the entry and judgment of affirmance heretofore made herein.

It is hereby certified that this court is the highest court of law and equity in the State of Ohio in which a decision of this case can be had. O. B. No. 18, page 357.

Oct. 7, 1902. Copy of entry of certification sent clerk of courts of Ottawa county.

" 6, " Petition for writ of error and assignment of errors filed and allowed.

" 7, " Bond in duplicate filed.

" 9, " Writ of error allowed.

" " " Citation issued to U. S. marshal, N. D. of Ohio, to be served upon attorney of record for defendants, and returned October 11th, 1902.

In the Supreme Court of Ohio.

THE STATE OF OHIO, }
City of Columbus. }

I, Lawson E. Emerson, clerk of the supreme court of Ohio, do hereby certify that the printed record hereto attached is a true and correct copy of the printed record filed in this court, July 27, 1900, and used by this court in the consideration of the case of The Winous Point Shooting Club *vs.* Jeppe Caspersen *et al.*, and that the foregoing petition for writ of error, assignment of errors, writ of error, citation and return thereon, and bond, are the original papers filed herein in said cause, and that the foregoing transcript of docket and journal entries is truly taken and correctly copied from the records of said court.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said supreme court this 21st day of October, A. D. 1902.

[Seal of the Supreme Court of the State of Ohio.]

LAWSON E. EMERSON,
Clerk Supreme Court of Ohio,
By J. G. OBERMEYRE, *Deputy.*

[Endorsed:] Supreme court of Ohio. No. 7167. The Winous Point Shooting Club *vs.* Jeppe Caspersen *et al.* Transcript.

Endorsed on cover: File No. 18,722. Ohio supreme court. Term No. 494. The Winous Point Shooting Club, plaintiff in error, *vs.* Jeppe Caspersen, Peter Petersen, William Decker and Charles Petersen. Filed November 1st, 1902.

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The surveys made by the Government were under authority of Acts of Congress passed May 18, 1796, (1 U. S. St. at L., 464) and February 11, 1805, (2 U. S. St. at L., 313), and plaintiff's title was acquired thereunder.

In 1820 the lands now owned by plaintiff were part of the public domain of the United States, in which year they were surveyed by Sylvanus Bourne, Government Engineer, who, in compliance with the provisions of said acts, noted in his field notes the location of Sandusky River and Muddy Creek, surveyed and meandered said watercourses, described the sections and fractional sections bordering thereon, made a plat of said lands and waters, copies of which plats and field notes have been for many years on file in the offices of the surveyors of Ottawa and Sandusky counties, Ohio.

At the time of the survey and sale, much of the land was described by said surveyor in his notes as marsh land, which has since become submerged by the action of the waters, but in most part this marsh land is still traceable by lowland and aquatic vegetation.

The Act of 1796 provides for the survey of the territory and sale of the lands. The Act of 1805 relates to the mode of surveying public lands. The former requires the surveyor to note in his field books the true situations of all *watercourses*, which books are to be returned to the Surveyor General, who is directed to cause a description to be made of the lands surveyed, which is to be transmitted to the Government officers who have superintendence of the sales. It is also provided in Section 9:

> " And be it further enacted that all navigable rivers within " the territory to be disposed of by virtue of this act, shall be " deemed to be and remain public highways. And that in all " cases, where the opposite banks of any stream, not navigable, " shall belong to different persons, the stream and the bed thereof " shall become common to both."

In the Government survey, the mouths of the Sandusky River were found, determined and fixed by the surveyor. The mouth of Muddy Creek was likewise located and fixed. Some of the lands in question bordering upon these streams were subsequently sold by the Government to plaintiff and its predecessors in title. Those lands remaining unsold and unfit for cultivation at the time of the passage of what is known as the "Swamp Lands Act," passed by Congress, September 28, 1850, (9 U. S. St. at L., 519), were ceded to the State of Ohio, and by the State conveyed to plaintiff and its predecessors in title according to the description furnished by the Secretary of the Interior to the Governor of the State.

The Circuit Court of Ottawa county was the trial court. In compliance with the statutes of Ohio, it made separate findings of fact and conclusions of law, and these were duly embodied in its decree.

As facts it found the waters those of river and creek, as surveyed by the Government Engineer, and as plaintiff contends. *As conclusions of law,* it determined said waters were a public bay, as defendants contend. The contradiction was due to the fact that the Government sur-

veys, which were part of the evidence, show, and every witness examined upon the subject, both for plaintiff and defendants, testified that said waters are of river and creek, and in making its findings of fact the court was bound by the evidence. In making its conclusions of law, the court considered itself bound by a previous decision of the Supreme Court in another case, in which it found, as *matter of law*, without any evidence before it, said waters to be those of a public bay.

It was and is conceded that in 1828 the Supreme Court of Ohio declared that owners of lands upon both banks of Sandusky River own to the middle of the river, subject only to the easement of the public for purposes of navigation, and such owners are entitled to the exclusive right of fishing in said river and in all navigable rivers within the State. This has been a rule of property in Ohio since that time.

Section 9 of the Act of Congress of May 18, 1796, also provided that all non-navigable streams and the beds thereof should belong to the owners of the banks. The uncontradicted evidence shows that Muddy Creek is not a navigable stream and never was.

A copy of a plat of the *locus in quo* is attached to this brief. The location of Sandusky Bay will be noted, and also of Eagle Island, which now contains about three acres but at the time of the Government survey in 1820 contained one hundred and thirty-five (135) acres.

Plaintiff claims ownership of all the lands lying west of a line drawn from Slate's Point on the north to the east end of Eagle Island, thence southerly to South Point.

The north and south channels of Sandusky River will be noted, one emptying into Sandusky River north and the other south of Eagle Island. The river is navigable for twenty-five miles from the east end of Eagle Island.

These two channels were meandered by the Government surveyor as Sandusky River in 1820, and the mouths of the river there located and fixed. The north channel is that used by vessels engaged in navigation. In 1866 the river was again surveyed by the Government, a copy of which survey is attached to the record.

Proceeding westerly, it will be observed that Muddy (Mud) Creek empties into Sandusky River between Winous Point and what is known as the "Middle Ground." There the Government located its mouth in 1820.

Plaintiff contended that these watercourses are as located and meandered by the Government and their location cannot be changed by the State either by legislation or judicial decree.

Defendants contend that the waters are of Mud Creek Bay, which is connected with Sandusky Bay and Lake Erie (Amended Answer, Rec. p. 9). It will be noted that the amended answer is not definite as to extent. The original answer, which is part of the record, is more definite, (Rec. p. 328), viz:

They deny that Sandusky River empties into Sandusky Bay and say that it empties into Mud Creek Bay at or near Squaw Island.

They deny that Mud Creek empties into Sandusky River.

They aver that Mud Creek Bay is about four (4) miles long east and west, and from one-half to two and one-half miles wide north and south, and is the western continuation of Sandusky Bay.

Taking the section lines for measurement, it is apparent that defendants claim that to be Mud Creek Bay from Eagle Island on the east to the westerly limits of plaintiff's property, that is, from Eagle Island on the east to Horse Shoe Island on the west, as shown on plat hereto attached, and from Squaw Island north to the dry land.

II.

ASSIGNMENT OF ERRORS.

1. That the Government survey of 1820 is binding upon the courts of Ohio, and the Supreme Court of Ohio erred in determining that Sandusky River and Muddy Creek are not situate and located as determined and declared by the United States in said survey, field notes and plats.

2. That the court erred in denying the title of plaintiff so acquired under and by virtue of Acts of Congress of May 18, 1796, and February 11, 1805, and September 28, 1850, to property bordering upon Sandusky River and Muddy Creek.

3. That the court erred in deciding that said waters were not of Sandusky River and Muddy Creek, but parts of a public bay in which defendants as members of the public have the right of fishing, because by said judgment plaintiff is deprived of its property without due process of law or just compensation, as guaranteed by the Constitution of the United States.

III.

THE JURISDICTION OF THIS COURT.

The question of the jurisdiction of this court to review the judgment of a State court has been raised so often, we may be pardoned for anticipating that it may be made here.

We appreciate that to confer jurisdiction the claim of federal rights must appear on the face of the record, in the pleadings or from the evidence or in the instructions asked for or from exceptions taken to the rulings of the court.

Parmelee v. Lawrence, 11 Wall., 38.

It is not necessary that the claim of federal rights be pleaded, if the record disclose that such claim was made.

Railroad v. Richmond, 15 Wall., 3.

Pennywit v. Eaton, 15 Wall., 380.

> "No particular form of words or phrases in which a claim "of federal rights must be asserted in a State court has ever "been declared necessary by this court; but it is sufficient, if it "appears from the record that such rights were specially set up

"or claimed there in such way as to bring the subject to the "attention of the State court."

Canal Co. v. Paper Co., 172 U. S., 58.
Armstrong v. Treasurer, 16 Pet., 281.
Murray v. Charleston, 96 U. S., 432.
Insurance Co. v. Needles, 113 U. S., 574.
Eureka Lake Co. v. Yuba County, 116 U. S., 410.
Railroad Co. v. Homestead Co., 123 U. S., 552.
Railroad Co. v. Chicago, 166 U. S., 226.

As was said in *Sayward v. Denny*, 158 U. S., p. 184:

"The right on which the party relies must have been called "to the attention of the court in some proper way, and the de- "cision of the court must have been against the right claimed."

The action was commenced in the Court of Common Pleas and appealed to the Circuit Court, where under the practice in Ohio there was a trial *de novo* upon the original pleadings. The Circuit Court was, therefore, the trial court.

That the questions presented to this court were properly raised in that court appears not only in the evidence but in the findings of that court, made under the practice in Ohio.

It will be noted that particular reference is made in the findings to the source of plaintiff's title, to the Acts of Congress under which it was acquired and to the surveys made by the Government under which it patented the lands, and that copies of the plats and field notes of the Government survey are specially made part of the findings of fact of the Court.

The Circuit Court found:

That plaintiff for many years prior to the commencement of the action was

"in actual possession of so much of the lands, marshes and "shores described in the petition (except Section thirty-five) as "described and comprised in the sections and fractional sections "described in the survey and map made by Sylvanus Bourne." (Rec. p. 28).

"That under and by virtue of authority of an act of Con- "gress passed March 18, 1796, providing for the sale of lands "of the United States, in the territory northwest of the Ohio "River, and of an act supplemental thereto, a survey was made "by Sylvanus Bourne, Government Engineer, in 1820, of the "lands and marshes described in said fractional sections, but "meandered the shore line of said waters, and divided said "marshes and lands into townships and sections in conformance "with the directions prescribed in said act. Said surveyor noted "in his field book the situation of all watercourses within said "territory, and also the quantity of the lands, and, in further "compliance with said act, a plat was made of all said lands and "watercourses and waters, and a copy of said plat is on file in "the offices of the county surveyors of Sandusky and Ottawa "counties, Ohio, copies of which were introduced in evidence,

" and, with the field notes accompanying the same, are attached " to the bill of exceptions herein and by reference are made part " of this finding of facts. It is found that said surveyor in 1820 " meandered Sandusky Bay and the other waters within the lines " of said sections and fractional sections, along the shores and " banks of the same, and gave courses and distances and certain " monuments, all of which are shown by the field notes attached " to said plat, and described said waters in his field notes as " Muddy Creek" and Sandusky River. From said plat and field " notes it appears that said surveyor determined the number of " acres of land in the fractional sections bordering upon said " waters, and did not include the lands under the waters in his " computation and statement of the lands in said sections and " fractional sections described in such survey and plat. That " much of said property so surveyed in said fractional sections " aforesaid is now submerged and overflowed land, and much " was marsh land at the time of said survey and was acquired " from the State of Ohio directly or indirectly through plaintiff's " grantors and predecessors in title under what is known as the " swamp land acts. The other lands, i. e., those not granted by " the State as swamp lands, were patented by the Government to " plaintiff's predecessors in title." (Rec. 29-30).

It will also be noted (Rec. p. 33) that in describing "Mud Creek Bay" reference is made to the Government survey of 1820, and to the survey of Muddy Creek.

Again reference is made to the survey in its finding of the location of Sandusky River. (Rec. pp. 40-41).

Again, in locating Eagle Island (Rec. p. 31):

" 'Eagle Island' is situated in Section 24, and is entirely " surrounded by water, and, as surveyed by the United States " Government in 1820, contained about 135 acres, but the island " has been washed away and now contains about three acres, and " is situated near the center of the south half of said Section 24. " The part of said 135 acres submerged is traceable by aquatic " vegetation."

Again, in locating "Horse Shoe Island" at the westerly limits of what defendants claim to be "Mud Creek Bay," (Rec. p. 30),

" 'Horse Shoe Island' is situated in the southeast " quarter of section 20, lying west of section 21, and is surround- " ed by water. The territory now known as 'Horse Shoe Island' " was not shown or designated on the plat and survey of Syl- " vanus Bourne made in 1820, as an island."

Also reference is made to the survey and map in the finding of the location of the "Middle Ground" at which place plaintiff claims Muddy Creek empties into Sandusky River. (Rec. p. 32).

These places were those which marked the location of river and creek as fixed by the Government survey upon which plaintiff relied, and the findings of the court clearly indicate that the title to these streams which plaintiff asserted came from the Government under Acts

of Congress authorizing the survey and sale of lands was at issue in this action in trial court in the usual and proper way; that the question raised was considered and passed upon by the trial court, whose decision was against the title of plaintiff in the waters and its rights and privileges thereunder, because the waters are not parts of Sandusky River and Muddy Creek, but of a public bay. The case was then taken to the Supreme Court, and in the petition in error it was alleged (Rec. 2) that the judgment was in contravention of the Constitution of the United States in that the private property of the plaintiff was taken for public use without just compensation.

In view of this specification, with the record before it for consideration, we submit that it appears by clear and necessary intendment that the federal question now presented to this court was directly involved so that the State Court knew just what was claimed and could not have given judgment without deciding the question.

Powell v. Brunswick County, 150 U. S., 440.

The certificate of the Supreme Court cannot confer jurisdiction upon this Court, but as the findings of the trial court disclose the contention of plaintiff there, so the certificate (Rec. p. 423) discloses that it was insisted by plaintiff in support of its allegation in the petition in error that "the waters in dispute had been surveyed by the United States as those of Sandusky River and Muddy Creek, and the lands mentioned and described in the case had been surveyed, sold and patented by the United States to plaintiff's predecessors in title as lands bordering upon said river and creek, all of which had been done under authority of Acts of Congress; that plaintiff had and possessed the sole and exclusive right of fishing in said waters; that the judgment and decree of the Circuit Court that said waters are not those of Sandusky River and Muddy Creek, but those of an open public bay, in which the public has the right of fishing, was in contravention of the Constitution of the United States, in that plaintiff was deprived of its private property and the same was taken for public use without just compensation to it; and it became material to the determination of said case in this Court to determine said question so made by plaintiff."

It thus appears from the certificate of the court that it fully comprehended the contention of plaintiff and passed upon the question here presented.

As we have stated, it was not necessary to aver in the pleadings source of title in such case under the State statutes, but the nature, source, existence and validity could be shown by evidence and every claim of right made at the trial. The record shows this was done.

We therefore submit that this Court has jurisdiction.

IV.

TITLE OF PLAINTIFF.

If the waters are those of Sandusky River and Muddy Creek, as surveyed by the United States, then under the many decisions in Ohio

plaintiff is the owner of the lands under those waters and has the exclusive right of fishing therein.

Gavit v. Chambers, 3 Ohio, 496.
Benner v. Platter, 6 Ohio, 505.
Blanchard v. Porter, 11 Ohio, 138.
Lamb v. Rickets, 11 Ohio, 311.
Walker v. Public Works, 16 Ohio, 540.
Hickok v. Hine, 23 O. S., 523.
Niehaus v. Shepherd,, 26 O. S., 40.
June v. Purcell, 36 O. S., 396.
State v. Shannon, 36 O. S., 423.
Day v. Railroad, 44 O. S., 406.
Lembeck v. Nye, 47 O. S., 336.
Railroad Co. v. Platt, 53 O. S., 254.
Pollock v. Shipbuilding Co., 56 O. S., 655.

If the waters are those of a public bay, then plaintiff is not the owner of lands thereunder and the public has the right of fishing therein.

Sloan v. Biemiller, 34 O. S., 492.

This rule of property does not affect the land under Muddy Creek, because the findings of fact disclose that it is not navigable, and under Section 9 of the Act of 1796, cited above, the grant by the Government gave title to the bed of that stream.

The Circuit Court found *as facts* that the waters surveyed by the Government as Sandusky River and Muddy Creek are as surveyed and as claimed by plaintiff. It, however, as *conclusion of law,* decreed them to be those of a public bay.

This contradiction was due to the decision of the Supreme Court in *Bodi v. The Winous Point Shooting Club,* 57 O. S., 226 and 629, in which case the Circuit Court found the waters to be those of river and creek, and enjoined defendants from hunting and fishing. The Supreme Court reversed that judgment as to fishing and affirmed it as to hunting.

In other words, the Supreme Court decided that the public has the right of fishing because the waters are of a public bay; but the public has not the right of hunting because the waters are the private property of plaintiff.

The Circuit Court, therefore, found the facts as the evidence exacted, and followed the Supreme Court in the law, and the case was passed along for the Supreme Court to wrestle with. This it did by affirming the judgment of the Circuit Court without report.

The Circuit Court found *as facts* that Sandusky River and Muddy Creek are situate as the Government engineer determined in 1820; that he noted in his field books the location of river and creek, described the sections and fractional sections, made a plat of the lands and watercourses, copies of which plats have been on file in the offices of the surveyors of Ottawa and Sandusky counties for many years. (Rec. p. 29.)

The evidence further shows that the Government caused another survey to be made of the Sandusky River in 1866, and that its engineers

considered those waters to be Sandusky River which defendant contends are a public bay. (Rec. pp. 308-313.)

It also found (Rec. p. 30) plaintiff to be owner and to have title to the lands upon both banks of Sandusky River and Muddy Creek; that its title came either directly by patent from the United States to itself or predecessors in title, or indirectly from the State of Ohio by virtue of what is known as the Swamp Lands Act, passed by Congress September 28, 1850. (9 U. S. St. at L., p. 519.)

It also found that the surveyor noted the quality of the lands, and that much which is now submerged and overflowed he described as marsh land (Rec. 30); that now dense masses of aquatic and lowland vegetation grow upon land surveyed as marsh land. (Rec. 41.)

It also found that Eagle Island at the time of the Government survey contained 135 acres, but now contains about three acres, the land having been washed away by the action of the waters; that part of the submerged land is still traceable by aquatic vegetation. (Rec. 31.)

It further found that Sandusky River empties into Sandusky Bay through two mouths, separated by Eagle Island, and in its findings describes Sandusky River and located it as surveyed by the Government and as claimed by plaintiff. (Rec. 40-44.)

"Muddy Creek" it finds (Rec. pp. 39-40) has banks well defined until it opens out into a wider expanse of water locally called Mud Creek Bay; that the channel of the creek runs through the so-called bay until it reaches Squaw Island, "where it empties into another channel hereinafter mentioned" (Sandusky River). This conforms to the Government survey and the claims of plaintiff.

"Mud Creek Bay" it finds (Rec. pp. 33-34), "is that body of water lying west of a line drawn from Winous Point to Squaw Island. *"Mud Creek Bay" is a local name given to a portion of the waters of Mud Creek which have spread over, and, together with waters coming from the north and south marshes, have submerged and overflowed the lowlands contiguous to its channel."*

The grants by patent from the Government and the cession by the Government to the State, both rest upon the survey of Bourne in 1820. (Rec. 30.)

These findings are embraced in the decree of the Circuit Court, which was wholly approved by the Supreme Court, which accepted but disregarded the facts found by the trial court.

The aforesaid Act of 1796 contains among other regulations one requiring the surveyor to note *all watercourses* over which the lines he runs shall pass and also the quality of the lands. It will be seen that there is no provision for noting or meandering bays, or for continuing section lines when a public bay is encountered. An inspection of the Bourne maps will disclose that he has followed the statute in running his lines when meeting a watercourse; that upon the maps, and in the field notes he has meandered Muddy Creek and Sandusky River. Looking first at the Ottawa county map, it will be seen he commenced at an elm in the southeast corner of Section 12. He then proceeded in a southwesterly direction, according to numbers placed thereon and re-

corded in his field notes, along the north side of Muddy Creek until he arrived at the west line of Section 27, where he has post No. 22. Then taking the Sandusky county map, it will be seen that he meandered Muddy Creek around until he came to post No. 23, on the north bank of Sandusky River, in Section 27; that he then proceeded along the north bank of Sandusky River until he got to the south section line of Section 32. We then get into a new township and the river is not shown, but it is taken up again on the south line of Section 32 and meandered to post 30; that his next post is on the south side of the river and on the south line of Section 32; that he then meandered the river on the south side until he got to post 37, on Sandusky Bay, in which vicinity the south channel of the river is lost in the waters of Sandusky Bay.

These meander lines and monuments are so exact and so clearly defined that the location of this river and creek cannot be doubted.

They had then and have now all the characteristics of watercourses—they are running streams. They have beds, banks and channels. They have a perceptible flow, while a bay has not.

Gould on Waters, Sec. 41.

The Government engineer found a navigable stream which he meandered, noted and platted, Sandusky River. He found a smaller non-navigable stream, which in this country is called a creek (1 N. Y., 107), and he meandered, noted and platted Muddy Creek.

He made no mention of any bay save Sandusky Bay, which is located *east of Eagle Island*, as shown upon his maps.

Thus plaintiff has title to lands bordering upon waters of the character of watercourses, which lands the Government caused to be surveyed and sold as bordering upon river and creek.

On September 28, 1850, Congress passed "An Act to Enable the State of Arkansas and Other States to Reclaim the Swamp Lands Within their Limits," in which "the whole of those swamp and *overflowed* lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State." (9 U. S. St. at Law, p. 519.)

It will be noted that this grant included not only swamp lands, which were unfit for cultivation, but also *overflowed lands*. Much of the land of plaintiff is this kind, the waters of Sandusky River, Muddy Creek and the several creeks flowing through its property having overflowed the lowlands contiguous to their channels. (Rec. 33.)

March 2, 1853, the legislature (51 Ohio Laws, p. 357) passed "An Act to Provide for draining and Reclaiming Swamp and Overflowed Lands Granted to the State of Ohio by Act of Congress, Approved September 28th, 1850."

The enacting clause shows that the sale of these lands was in compliance with the Government survey of 1820 aforesaid, viz:

> "Be it enacted by the General Assembly of the State of
> "Ohio, That within thirty days after the passage of this act, the
> "Auditor of State shall cause to be transmitted to the county
> "auditor of each county in which any of said swamp or over-

"flowed lands may be situated, a list of the same *by such de-*
"*scription, and in such divisions and subdivisions as reported*
"*by the Secretary of the Interior to the Governor of the State*
"*of Ohio.*"

Among other things the act provides (Sec. 7) it shall be the duty of the Governor to execute and deliver patents "for the lands therein described."

Thus clearly demonstrating that the lands were sold and patented by the State according to the description, divisions and subdivisions reported by the Secretary of the Interior to the Governor. These were made by Government Engineer Bourne in 1820.

We submit that Congress having been invested by the constitution with power of disposing of public lands and making needful rules and regulations respecting them, "whenever the question in any court, state or federal, is, whether a title to land which had once been the property of the United States has passed, the question must be resolved by the laws of the United States." (13 Pet., 517.)

In *Cruse v. McCauley*, 96 Fed., 370, it is held:

"A patentee of public land over which a stream flows acquires all the rights in the waters of such stream possessed by the United States at the time the patent took effect."

In *Mitchell v. Smale*, 140 U. S., p. 413, it is said:

"All the legal consequences of such a boundary, (stream) in the matter of riparian rights and title to land under water, regularly follow."

As to the right of the Government to find and declare the mouth of Sandusky River, this Court has stated:

"The public, by the act of the proper officer, had a right to fix and declare the place of the river for the purpose of a survey and sale of the lands." * * * * * * * *

"The public had the option to declare the true mouth of the river, for the purposes of a survey and sale of the public land."

Bates v. Railroad Co., 1 Black, 204.

Defendants have no right to question the correctness of this survey or to claim that the waters are not those of Sandusky River and Muddy Creek, as surveyed.

Horne v. Smith, 159 U. S., 40.

We submit that the Government, having exercised its option and right, and having fixed and declared the mouths of Sandusky River at Eagle Island, and the mouth of Muddy Creek near Squaw Island, and declared that at that place it emptied into Sandusky River, and having meandered these waters as watercourses, and made plats and sold the lands as bordering upon Sandusky River and Muddy Creek, that neither the location or character of those streams can be changed by the State Courts so as to affect private rights acquired directly or indirectly from the Government.

As to the value and correctness of this Government survey and field notes, it has been held by Federal and State courts that the reports of deputy surveyors, contained in field notes and plats of this character,

have the force of depositions, and are conclusive upon the Government and all concerned as to that which is shown therein.

Beard v. Federy, 3 Wall., 478.
Stoneroad v. Stoneroad, 158 U. S., 240.
Russell v. Land Co., 158 U. S., 253.
R. R. Co. v. Walker, 47 Fed., 681.
Martin v. Hughes, 90 Fed., 632.
Brown v. Parker, 127 Mich., 390.
Tolleston Club v. State, 141 Ind., 197.
Sizor v. Logansport, 151 Ind., 626.
Shurmeier v. R. R., 10 Minn., 59.
Ellis v. Carey, 30 Ala., 725.
Rhodes v. Otis, 33 Ala., 578.
Lewis v. County, 77 Ala., 193.

In *Kirby v. Lewis*, 39 Fed., 75, it is said, in reference to a survey thus made under the Act of 1796:

"The value of the field notes as evidence was settled by the Supreme Court of the United States in the case of *U. S. v. Low*, 16 Pet., 166, where the court say: 'The official return of the Surveyor General has accorded to it the force of a deposition.' * * * They rank as the deposition of a surveyor, charged under oath with the duty of noting on the spot, at the time he makes the survey," etc.

There is no conflict in the testimony, for that of every witness on both sides who gave evidence upon the subject is the foundation upon which the aforesaid findings of fact rest.

In the absence of any conflict in the testimony, we assume we may call the attention of the court to a fraction of it, if for no other purpose than to show how fully it sustains the correctness of the Government survey.

Col. Smith, United States Engineer having control of the territory between Detroit River and Erie, Penna., for eight or nine years previous to date of trial, during which time the Government improved Sandusky River, and who has had personal acquaintance with the river during that time, testified (Rec. pp. 308-313) that a survey of Sandusky River was made by the Government in 1866 under the direction of Gen. Cram, for the purpose of locating the river from Fremont to Upper Sandusky Bay, and a map was made. (Copy is attached to record, marked "Plaintiff's Exhibit A.")

This map shows that the Government found Sandusky River empties into Sandusky Bay at the east end of Eagle Island, as plaintiff contends, and as the Government engineer found in 1820.

Col. Smith further said that from his acquaintance with Sandusky River, he knows it has a well-defined channel its entire length from Fremont to its mouth, which mouth is at a line drawn tangent on the east or northeast side of Eagle Island to the small headlands on the opposite side of the channel, as shown on the map. (Rec. 310-311.)

It is evident the character of the river has not changed since Bourne surveyed it in 1820, and that the United States still regards these waters Sandusky River. As such it maintains its supervision thereover.

Col. Bartlett, who has known these streams for upwards of fifty years (Rec. 58-59), stated that the river runs in a continuous channel until it reaches a point at the head of what is known as Eagle Island; that there the channel branches, one running off in a northeasterly direction and losing itself in Sandusky Bay at a point on a line between Eagle Island and Slade's Point; that the other or south branch runs off in a southeasterly direction and loses itself in the bay between the east end of Eagle Island and South Point; that it is navigable in its channel as far as Fremont.

He describes Muddy Creek from its source to the place where it empties into Sandusky River between Squaw Island and Winous Point. (Rec. 65-68.)

Mud Creek Bay, he says, is a local name given to the waters of Muddy Creek which have spread over the adjoining lowlands; that Muddy Creek runs through this so-called bay. (Rec. 68-69.)

Mackey (Rec. 105), Fitzgerald (Rec. 136-174), Jones (Rec. 201-209), French (Rec. 271-279), gave similar testimony.

Charles E. Dewitt, county surveyor of Ottawa county, witness for defendants, states that Sandusky River empties into Sandusky Bay at Eagle Island and Muddy Creek empties into Sandusky River, and that unaffected by the winds these streams carry off the waters coming from their sources and tributaries. (Rec. pp. 226-227-237-238-239-240-241.)

This evidence not only located Sandusky River and Muddy Creek as claimed by plaintiff, but it clearly demonstrates that these waters have all the characteristics of watercourses and not a single one of bays.

Gould on Waters, Sec. 41, defines a river:

"A running stream of water pent up on either side by banks, shores, or walls."

The Supreme Court of Ohio (3 Ohio, p. 498) says: "A river consists of water, bed and banks."

In 28 *Ency. of Law* (O. S.), p. 944, a watercourse is defined:

"A stream of water usually flowing in a definite channel having a bed and sides, or banks, and discharging itself into some other stream or body of water."

Angell on Watercourses, Sec. 4.
Woolrych on Waters, 40.
McMannus v. Carmichael, 3 Ia. 1.

"To constitute a watercourse, according to the ordinary signification of that term, there must be a stream usually flowing in a particular direction, and in a definite channel, and it must usually discharge itself into some other stream or body of water."

People v. Bridges, 142 Ill., 37.
Palmer v. Waddell, 22 Kas., 352.
Robinson v. Shank, 20 N. E. Rep., 713.

The evidence is in agreement that these waters have distinct beds, banks, channels and currents,—every element of watercourses. The current of the latter stream is distinct until it has passed Eagle Island and mingled with the still waters of Sandusky Bay. It is so strong

that it is perceptible for some distance after it empties into these still waters.

Attempt has been made to confine the river to the channel and to term a bay its waters which have overflowed the lowlands adjoining. But we submit the extent of the river is not limited to the channel.

The Sarah, 52 Fed., p. 235:

"The term 'channel' is properly applied to that portion of the bed of a river or canal which furnishes uninterruptedly through its course the deepest water."

As was said in *Johnson v. State*, 74 Ala., 537:

"There is a well recognized distinction between a river and a bay, the one being an inland stream and the other an inlet of the sea. Where the one begins and the other ends may often be a question of difficulty; yet the two are legally and essentially distinct."

A "bay" is defined to be

"An opening into the land where the water is shut in on all sides except at the entrance."

3 *Ency. of Law* (N. S.), 899.

U. S. v. Morel, 13 Am. Jur., 286.

Gould on Waters, Sec. 41, says a bay has no regular or perceptible flow.

Nor is there any thread of stream.

Sloan v. Biemiller, 34 O. S., p. 512.

So we have the fact that the waters which defendants claim to be those of a public bay have the character of watercourses, and not of bays. That they are confined between banks, have currents and channels; that there is a thread of stream, and the waters have a regular and perceptible flow into one direction, and are not shut in.

PLAINTIFF IS OWNER OF LANDS UNDER THE WATERS OF SANDUSKY RIVER AND MUDDY CREEK.

As early as 1828 the Supreme Court of Ohio recognized the Government surveys as binding upon the State, and then made a rule of property applicable to all cases where rivers are navigable and "*treated as such by the United States in selling the lands.*"

The decision was made in *Gazit v. Chambers*, 3 Ohio, 496, in settling a dispute about the ownership of the bed of Sandusky River not far from plaintiff's property, surveyed under authority of the Act of Congress of 1796. The court said (p. 497):

"It is, we conceive, vitally essential to the public peace, and to individual security, that there should be distinct and acknowledged legal owners for both the land and water of the country. * * * It cannot be reasonably doubted, that, if all the beds of our rivers supposed to be navigable, and treated as such by the United States, in selling the lands, are to be regarded as unappropriated territory, a door is opened for incalculable mischiefs. Intruders upon the common waste, would fall into endless broils among themselves, and involve the owners of the adjacent lands in controversies innumerable. Stones, soil, gravel,

the right to fish, would all be subject for individual scramble, necessarily leading to violence and outrage. The United States would be little interested in preserving either the peace or the property, and, indeed, would be powerless to do it, without an interference with the policy of the state, as unsuitable for the Union to exercise, as it would be inconvenient, if not dangerous to state sovereignty. * * * He who owns the lands upon both banks, owns the entire river, *subject only to the easement of navigation,* and he who owns upon the bank only, owns to the middle of the river, subject to the same easement."

We have cited decisions of the Supreme Court of Ohio showing this is and has been since 1828 a rule of property in Ohio. This rule will be observed by the Federal Courts.

In *St. Louis v. Rutz,* 138 U. S., 242, the court says that the question whether the fee of the riparian proprietor extends to the thread of the stream or only to the water's edge is one in regard to a rule of property which is governed by the local law of the state in which the property is situate.

In *Hardin v. Jordan,* 140 U. S., 371, it is said:

"Grants by the United States of its public lands bounded on streams and other waters, made without reservation or restriction, are to be construed, as to their effect, according to the law of the state in which the lands lie."

Barney v. Keokuk, 94 U. S., 324.
St. Louis v. Myers, 113 U. S., 566.
Packer v. Bird, 137 U. S., 661.

In *Shively v. Bowlby,* 152 U. S., 2, it is held:

"The title and rights of riparian or littoral proprietors in the soil below high water mark are governed by the laws of the several states, subject to the rights granted to the United States by the Constitution."

We, therefore, submit that the effect of the grant of these lands by the United States bounded by these streams, according to the rule of property established in Ohio, was to give to plaintiff title to the entire streams, subject only to the easement of the public in Sandusky River for purposes of navigation. As Muddy Creek is not navigable, this title of plaintiff is also fortified by the act of Congress of 1796.

VI.

WHAT RIGHTS HAS THE PUBLIC IN SANDUSKY RIVER AND MUDDY CREEK.

It has been generally held that the public does not have a right of hunting in rivers wherein the owner of the banks owns the bed of the stream.

Toledo Liberal Shooting Co. vs. Erie Shooting Club, 90 Fed., 680.
Hall v. Alford, 114 Mich., 165.

The Supreme Court of Ohio has determined that the public has no right of hunting on the waters of Sandusky River.

State v. Shannon, 36 O. S., 423.

In *Bodi v. The Winous Point Shooting Club,* 57 O. S., 629, the Supreme Court decided that the public has not the right of hunting over the waters involved in this action. The Circuit Court had declared the public has not the right of hunting or fishing. The Supreme Court reversed the judgment as to fishing and affirmed it as to hunting.

In this action defendants originally claimed the right to hunt over the waters in dispute (Original Answer p. 328), but the Supreme Court having declared in the above case that the public could fish because the waters are public, but could not hunt because the waters are private, they withdrew their claim of right to hunt and filed an amended answer (Rec. p. 8) in which they only claim the right to fish. The right of hunting, therefore, is not involved herein.

We insist the only right of the public in any of these waters is navigation. In Muddy Creek and its overflow—Mud Creek Bay—there is not such right, as they are not navigable.

The statute of 1796 declares that *"navigable rivers"* shall be deemed to be and remain public highways, and they have been uniformly considered in Ohio to be nothing more than public highways over which the public has the easement of navigation for purposes of commerce.

In this connection, it will be noted that the Government did not denominate "Muddy Creek," a river. As no provision was made in the act that smaller streams, such as creeks, should be or remain highways, it was clearly not the intention of the Government to impose upon that creek the public easement of navigation. That creek does not have any of the elements of navigability, as defined by law.

In *Gazit v. Chambers,* 3 Ohio, 496, rivers are referred to as highways, burdened only with said easement. They are so termed in 23 O. S., 523, and other cases, but we think we need the support of no other case than *Pollock v. Cleveland Ship Building Co.,* 56 O. S., 655.

"The right of the public in the river," Birchard, J., says, in *Walker v. Public Works,* 16 Ohio, p. 544, "is merely the right to use the water *within the channel* for the purposes of navigation."

The only right being that of navigation, *ex necessitate rei,* the public is limited in the exercise of that right to *navigable waters.*

In *Wall v. Harbor Co.,* 152 Penna. St., 427, where coal barges were anchored in front of plaintiff's property, the court said:

"Defendant had a right of navigation over plaintiff's land * * * and when necessary to the exercise of that right, is might have made a temporary mooring; but, in any use which it made beyond that, it became a mere trespasser on the right of property. * * * It is immaterial that the company defendant did not inconvenience plaintiff's approach to the shore, or that she had in fact made no use of the property—for the company's right was of navigation alone, and its conduct was an invasion of plaintiff's right of property."

The legislature of Ohio has recognized the property rights of

riparian owners in Section 6881a. R. S., and therein provided for the punishment of any one who anchors a shanty-boat in a creek or river without the consent of the owner of the land.

The Supreme Court of Ohio (56 O. S., p. 655) has held that the mooring of boats over a person's land in a river unless engaged in navigation and commerce, is a wrong to such owner, to prohibit which an injunction will be granted.

Hence we submit the only right of the public in any of these waters is the right of navigation in Sandusky River; that it does not have any rights in Muddy Creek.

VII.

THE PUBLIC HAS NO RIGHT OF FISHING IN SANDUSKY RIVER OR MUDDY CREEK.

In Ohio navigable streams are as much the subject of private ownership as unnavigable ones.

State v. Shannon, 36 O. S., p. 428.

It is equally well settled that the only public waters in Ohio are Lake Erie, its estuaries and bays, and that in these only has existed the common right of fishing.

Sloan v. Biemiller, 34 O. S., 492.

The common right of fishery has at all times and in all places in this country and England been limited to public waters. The decisions of England have been uniformly to the effect that the owner of land bordering on waters which are not public, whether navigable or not, has the exclusive right of fishing in front of his land, to the middle of the stream.

Blackstone, in commenting upon the rights of the public in animals *ferae naturae*, says:

"But it follows from the very end and constitution of society, that the natural right as well as many others belonging to man as an individual, may be restrained by positive laws enacted for reasons of state, or for the supposed benefit of the community." (2 Bl. Com. 410.)

Fish are animals *ferae naturae* (142 Ill., 30); and in recognition of this right of restraint, it was declared in *Gavit v. Chambers*, 3 Ohio, p. 498, the right to fish in the streams in Ohio to be in the owner of the soil, to the end that numerous broils and controversies thereby be prevented.

The right of fishing and hunting is a boon and privilege granted either expressly or impliedly by the state (161 U. S., p. 533), and the state may withhold, qualify or restrict the right as in its judgment will best subserve the public welfare.

This having been the policy of Ohio, and it having made this rule of property with respect to its rivers, we submit that

"Riparian proprietors upon fresh water streams have the exclusive right of fishing in the water opposite their lands, and this right

extends to navigable fresh rivers as well as those which are unnavigable, where the soil of the former is held to be private property."

Gould on Waters, Sec. 182.

Angell on Tide Waters, 105.

In *Holyoke Co. v. Lyman*, 15 Wall., pp. 506, 512, it is said:

"Persons owning the whole of the soil constituting the bed and banks of the stream are entitled to the whole use and profits of the water opposite their land * * * as a fishery. * * *

Ownership of the banks and bed of the stream, as before remarked, gives to the proprietor the exclusive right of fishery, opposite his land."

In *Hooker v. Cummings*, 20 Johns. (N. Y.), 92, the court holds that if the soil on both sides be owned by an individual, he has the sole and exclusive right of fishing.

In *Trout & Salmon Club v. Mather*, 68 Vt., 342, the court says:

"Fresh rivers, of what kind soever, do of common right belong to the soil adjacent, so that the owners of the one side have, of common right, the proprietary of the soil, and consequently have the right of fishing *usque ad filum aquae;* and the owners of the other side the right of soil or ownership and fish unto the *filum aquae* on their side, and if a man be the owner of the land on both sides, in common presumption he is the owner of the whole river, and hath the right of fishing according to the extent of his land."

In *Beckman v. Kraemer*, 43 Ill., 447, quoting from *Washburn Law of Easements and Servitudes*, Sec. 411, it is said:

"By the common law, a right to take fish belongs so essentially to the right of soil in streams or bodies of water where the tide does not ebb and flow, that if the riparian proprietor owns upon both sides of such streams, no one but himself may come upon the limits of his land and take fish there; and the same rule applies so far as his land extends, to-wit, to the thread of the stream where he owns one side only. Within these limits, by common law, his right of fishery is sole and exclusive, unless restricted by some local law or well established usage of the state where the premises may be situated."

People v. Bridges, 142 Ill., 43.

Fuller v. Shedd, 161 Ill., 489.

If the public have no rights in those waters except navigation, it would seem clear that defendants, not having been engaged in navigation but in fishing, were there wrongfully.

It is also apparent that defendants to obtain the right of fishing in these waters must have the surveys of the United States set aside, and what was therein declared to be river and creek converted into a public bay or estuary of Lake Erie. This the Supreme Court of Ohio erred in doing.

VIII.

ARE DEFENDANTS ENGAGED IN NAVIGATION AND COMMERCE?

Defendants assert that they are engaged in commerce when catch-

ing fish in these waters, dumping them in small boats and rowing them to a neighboring city to sell, and that in so doing they are exercising the public right of navigation; that all of the waters in which they fish are navigable.

We are thus compelled to distinguish navigation and commerce from the acts of defendants, and the waters in which they desire to fish from navigable waters.

"Navigation is a term applied to the science or business of conducting vessels or materials over navigable waters."

Gerrish v. Brown, 51 Me., 262.

This, then, is the easement to which the waters are subject, and as that can only be carried on in navigable waters, clearly the public has no rights elsewhere. As is said in

Walker v. Public Works, 16 Ohio, p. 544:

"The right of the public is merely the right to use the water *within the channel for the purposes of navigation.*"

Yet, defendants claim the right to go outside of the channel, into all the shoal places, set their nets, catch the fish and load them upon boats drawing a few feet of water. They claim they are then engaged in commerce, and in navigation when they row or sail these boats away.

The Court, in *Pollock v. Shipbuilding Co.*, 56 O. S., p. 668, discusses the meaning of the term "easement of navigation."

"Clearly the term 'easement of navigation,' should not be construed in any narrow, scientific sense, but, having in mind that the reservation of the easement by the state is for the benefit of the public in its use of the highway, should receive a construction in harmony with the nature of the uses of the water by the public, and the objects of a public nature to be accomplished by such uses. Those objects relate to trade and commerce, which is the interchange of goods or products between nations or individuals by means of transportation. 'Commerce,' says Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat., 1, 'is traffic, but it is something more; it is intercourse.' Commerce, then, is the object; navigation the instrument or incident. In other words, navigation is the means by which commerce is accomplished, and it is for the purpose of aiding commerce that navigation is encouraged and protected. When the term 'easement of navigation' is used, therefore, it carries with it the idea of navigation for the purposes above expressed; so that, whatever relates to commerce, or is incident to it, is embraced in the term."

Also, *Groves v. Slaughter*, 15 Pet., 511.

"Commerce * * * * consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. * * * *

"The improvement of harbors, bays, and navigable rivers within the States * * * is to insure freedom in their navigation, so far as that is essential to the exercise of its commercial power."

County of Mobile v. Kimball, 102 U. S., 691, 699.

"Commerce * * * consists of intercourse and traffic between

citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities."

Gloucester v. Pennsylvania, 114 U. S., 203.

Welton v. Missouri, 91 U. S., 280.

We submit these defendants were not engaged in navigation and commerce, as comprehended by our laws and decisions.

IX.

WHAT ARE NAVIGABLE WATERS?

It is conceded that the channel of Sandusky River is navigable, but defendants claim all of the waters are navigable because they are capable of floating skiffs and flat-bottomed fishing boats.

Waters are navigable in law that are navigable in fact.

The Daniel Ball, 10 Wall., 563.

Packer v. Bird, 137 U. S., 667.

Reference to the evidence discloses that defendants were fishing in water but four feet deep (Rec. 149) and had their capstans in the soil under water but eight to ten inches deep. (Rec. 110.) They claim this was navigable water.

The testimony discloses that the waters which defendants claim to be navigable are from one inch to four feet deep (Rec. 100 to 108, 138, 192), and most of them much below a foot in depth; that at the place Muddy Creek empties into Sandusky River it is only three and a half to four feet deep in the channel. (Rec. 137.) The average depth in the so-called bay, outside of the channel of Sandusky River is three feet. (Rec. 115.)

All over these waters, except in the channel of Sandusky River, is a heavy growth of aquatic and lowland vegetation, in some place as "thick as the hair on a dog," and it is impossible to row through it. (Rec. 59, 67, 68, 132, 133, 137, 138, 141, 143, 163, 165.) Photographs attached to the record disclose the density of this vegetation in waters defendants claim to be navigable.

The Sandusky River is navigable in its channel as far up as Fremont—twenty-five miles from the mouths, but in all other places the only kind of craft that can sail are flat-bottomed boats drawing about a foot of water. (Rec. 144-145.) In many places they call a bay the vegetation is so thick that it is only boats drawing a few inches of water can get through, and then only by punting. (Rec. 60-67.) There never was any navigation outside of the channel of Sandusky River except with the flat-bottomed boats aforesaid.

The Court (Rec. 33 to 43) quite accurately describes these waters. In view of this evidence and these findings by the court, we maintain there is no navigable water outside of the channel of Sandusky River, because

"In this country, waters, to be navigable in law, must be capable of navigation in fact *as highways for the transportation of commerce.*

A bay or arm of one of the Great Lakes, some 4,000 acres in extent, which was patented to the state as swamp land, and which, though of sufficient depth for navigation where it opens into the lake, is throughout the remainder of its extent of an average depth of not more than two feet, and rarely more than three feet, and is covered through the summer with grass and rushes, is not navigable water, but merely a marsh, and subject to private ownership."

Toledo Liberal Shooting Co. v. Erie Shooting Club, 90 Fed., 682.

Judge Lurton says:

"None of the characteristics of commercial navigability are shown here. It is the natural feeding ground of the duck and other water fowl. In their pursuit by canoe and flat-bottomed ducking boats the water may be navigated. That is not commerce, and proves nothing. The same test would convert every pond and swamp capable of floating a boat into a navigable stream or lake. This bay is not a highway, never has been, and can never be. At the common law the term 'navigable' had a technical meaning, and was applied to all streams or bodies of water in which the tide ebbed and flowed. All such waters were public. That definition is not applicable in this country, and all waters are held navigable in law, and subject to a public use, which are by their character capable of use as highways, for purposes useful to trade or agriculture. It is the capability of being navigated for useful purposes, which is the test."

In *The Montello*, 20 Wall., 439, Judge Davis says:

"They are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. * * * * *

"If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river. It is not, however, as Chief Justice Shaw said, 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.'" (441-442.)

Same declaration in

Rowe v. Bridge Corporation, 21 Pick., 247.

Hubbard v. Bell, 54 Ill., 119.

"Although this pond is inherently capable of floating a fishing skiff

or a gunning canoe, no claim is made that it is inherently capable of use to any extent beneficial to trade or agriculture."

New England Trout Club v. Mather, 68 Vt., 338.

In *Hickok v. Hine*, 23 O. S., 523, it is held:

"A river is regarded navigable which is capable of transporting the products of the country, or upon which commerce may be conducted; and its character as a highway is determined by its navigable capacity rather than by the frequency of its use for navigation."

These tests of navigability are also applied in

The Genesee Chief, 12 How., 443.
Barney v. Keokuk, 94 U. S., 324.
Packer v. Bird, 137 U. S., 661.
Shively v. Bowlby, 152 U. S., 1.
Gould on Waters, Sec. 54.

"To be navigable it must be of actual or practical utility to the public as a channel of trade."

Lewis v. County, 77 Ala., 193.
Boyzer v. McMillan, 105 Ala., 395.

In *Chisholm v. Caines*, 67 Fed., 285, it is held:

"In determining whether streams and arms of the sea traversing marsh lands are public, navigable waters, the test is whether they are, or are capable of becoming, public highways; that is, a means, open to the public, of passing from one place, where they have a right to be, to another, in which they have the same right. In other words, there must be a public terminus at each end, and hence partially navigable creeks which open upon a bay, but lead merely into private lands, are not public, navigable water."

We submit that the waters outside of the channel of the Sandusky River have no element of navigability; that they are not, never have been and cannot become a highway for the transportation of commerce.

They are too shallow to support watercraft upon which products can be transported, and are only capable of carrying flat-bottomed duck boats, fishing boats and row boats drawing a few inches of water, and are no more navigable than hundreds of creeks running through meadows in all parts of the country, which it would be absurd to call navigable streams in a legal sense.

Further, from the latter part of May to the latter part of October, the waters are covered with a dense mass of lowland and aquatic vegetation, so thick in most places that even small boats of the kind above mentioned cannot be propelled over them except by the laborious method of punting. And from early November until April they are covered with ice so thick that in many places it freezes to the bottom, and in all places makes navigation impossible. So that at best it is only for a few months in the year that these small boats can be propelled at all in these shallow waters except by placing a pole or oar on the bottom and pushing them along.

Under these circumstances, to state that they are of actual or

practical utility to the public as a channel of trade is to ignore and disregard every decision ever made defining "navigable waters."

Nor can the waters outside of the channel of the river be made highways, for persons cannot pass from one point to another thereover. The Circuit Court found that Mud Creek Bay was west of a line drawn from Winous Point to Squaw Island. Those waters are entirely surrounded by the lands of plaintiff, so that as declared in 67 Fed., 296, and 28 Ind., 267, *supra*, there can be no highway upon which commerce can be carried on, because there is no outlet after entering upon them, and no place to land and trade except upon the land of plaintiff.

In view of these authorities and the facts in this case, we submit that the only navigable waters within the territory described are those of the channel of the Sandusky River, in which the public has no right of fishing.

THE JUDGMENT IS IN CONTRAVENTION OF THE CONSTITUTION OF THE UNITED STATES, IN THAT IT DEPRIVES PLAINTIFF OF LANDS SURVEYED, PLATTED AND SOLD AS BORDERING UPON SANDUSKY RIVER AND MUDDY CREEK, WITHOUT DUE PROCESS OF LAW AND JUST COMPENSATION.

Congress was given power by the Constitution (Article 4, Sec. 3) to dispose of the public lands, and to make needful rules and regulations respecting them. These surveys and plats were made in conformance to those rules and regulations. And in the many cases above cited it was held that the surveys and plats were binding upon the Government and all concerned.

The Supreme Court of Ohio long ago conceded that the Government has the right to survey, plat and patent to individuals the lands in question as bordering upon river and creek, and declared those patents should be so construed as to give effect to their true intent and meaning. *James v. Howell*, 41 O S., 707.

In this connection, we do not feel called upon to support by authority the statement that the security of titles and the public peace require that confidence should be reposed in the action and records of officials acting within the scope of the jurisdiction conferred upon them by law, and that the patent issued by the Government is the final record of the judgment of those public officers to whom alone has been committed the jurisdiction to ascertain and determine the matters set forth in the surveys and plats, as well as the patents.

It has, however, been decided that

"When lands are granted according to an official plat of their survey, the plat, with its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and, so

far as limits are concerned, controls as much as if such descriptive features were written out on the face of the deed or grant."

Cragin v. Powell, 128 U. S., 691.

In the above case, the contention was that the patents did not recite that the lands bordered upon a bayou. The court, in using the above language, calls attention to the fact that it was the duty of the surveyor to note all watercourses over which the line he runs may pass, etc. (Secs. 2395-2396 R. S.); and having done so the survey, plat with its field-notes, etc., became part of the grant though no descriptive features of the character of the land were contained in the patent.

In *Heath v. Wallace*, 138 U. S., 585, where the character of the land was in question, the court said:

"It is settled by an unbroken line of decisions of this court in land jurisprudence that the decisions of that (land) department upon matters of fact within its jurisdiction, are, in the absence of fraud or imposition, conclusive and binding on the courts of the country. * * * We are of the opinion, therefore, that the decision of the land department on a question of the actual physical character of certain lands is not subject to review by the courts."

In *Knight v. Association*, 142 U. S., 176, it is said:

"It is a well settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the Government, and that the action of that department, within the scope of its authority, is unassailable in the court except by direct proceeding."

Mr. Justice Fields also says that if this record of the Government could be denied and controverted, "the patent would fail to be, as it was intended it should be, an instrument of quiet security to its possessors," and would introduce endless confusion and perplexity.

In *French v. Fyan*, 93 U. S., p. 172, it is said:

"It would be substituting the jury or the court sitting as a jury, for the tribunal which Congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey."

To the same effect is

Steel v. Smelting Co., 106 U. S., 447.
Fussell v. Gregg, 113 U. S., 550.
Wright v. Roseberry, 121 U. S., 505.
Noble v. Railroad, 147 U. S., 174.
Chandler v. Mining Co., 149 U. S., 79.

Unless the location of the lands, the nature and character thereof and of waters upon which they border, as found by the Government, be conclusive upon it and all concerned, and upon the courts of the country, no citizen could have or give any assurance of the extent of his ownership. And this case affords a most apt illustration of the insecurity of title if the physical character of the land and waters and

the matters of fact found by the Government (which, as we have seen, control as much as if it had been set out in the patents that the waters were those of Sandusky River and Muddy Creek, 128 U. S., 691, *supra*), could be made a subject of review by any court of the State, in a collateral proceeding, upon contestation by mere intruders without any title or claims of title.

The result might be in any case to render null the power given Congress by the Constitution to make rules and regulations for the sale of the public lands. No grant would be secure to the citizen. The land he had bought as adjacent to a watercourse, the ownership of which invested him with the rights of a riparian proprietor to the thread of the stream, migh be declared by the courts of a State to be adjacent to an open bay, and the owner deprived without compensation of his riparian rights.

If courts may disregard the action and grants of the Government, why may not the legislature also do so? And in this age public clamor may do much to deprive the citizen of his property unless he is fully protected in his guaranteed constitutional rights. For the reason that neither courts nor legislature may deprive a citizen of his property rights without due process of law and without compensation, and that he may be secure in his title and in all the rights vested in him thereby, it has been the uniform holding of the courts of the land that the facts recorded in the Land Office of the Government, and upon which grants are made, shall not be reviewed except for fraud or mistake.

Hence, we submit, that these waters cannot now be held to be those of an open bay, without a review and setting aside of the facts so recorded in survey, plat, field-notes and grant, and the taking of plaintiff's property rights without due process of law and just compensation.

The rule of property in Ohio, that the owner of lands on both sides of a river or creek whether navigable or unnavigable, owns the bed of the stream, and is entitled to every beneficial use and enjoyment thereof, including the sole right of fishing and hunting therein and thereover, has been declared in several cases by the Supreme Court of Ohio in determining the rights of persons owning land along the Sandusky River, conveyed by the Government under the very act in which the survey and sale of the property owned by the plaintiff was authorized.

Gavit v. Chambers, 3 Ohio, 496.
June v. Purcell, 36 O. S., 396.
State v. Shannon, 36 O. S., 423.

We maintain that the rights thus acquired by plaintiff cannot be taken away or plaintiff divested thereof without due process of law and just compensation to plaintiff therefor.

Kaukauna Co. v. Green Bay Co., 142 U. S. 254.

As early as *Walker v. Public Works*, 16 Ohio 540, the court held:

"The legislature cannot, by declaring a river navigable which is

not so in fact, deprive the riparian proprietors of their rights to the use of the water for hydraulic and other purposes, without rendering them compensation."

Birchard, C. J., said, in rendering the opinion:

"He who owns the land on both banks of such river, owns the entire river, subject only to the easement of navigation, and he who owns the land upon one bank only, owns to the middle of the main channel, subject to the same easement. The right of the public is merely the right to use the water within the channel for the purposes of navigation. The proprietor of the lands upon its banks may use the waters of the river in any way not inconsistent with the public easement, or of private rights, and neither the State nor any individual has the right to divert the water to his injury. The right of the adjacent proprietor to the water of the stream is an usufructory right, appurtenant to the freehold, not an absolute property. Hence the State in its exercise of the right of eminent domain can subject the waters of such stream to other public uses the same as any other private property, *by making a just compensation for the injury, and not otherwise.*

* * * * * * * * * * * * *

"A right of this description is a right of property within the protection of the Constitution, and that cannot be impaired by a legislative enactment which provides no compensation to the proprietor for the injury."

The court then declares that the legislature has no power to change the private rights of the riparian proprietor.

In *Day v. Railway*, 44 O. S., 419, the court quotes with approval much of the foregoing, and says:

"To disturb the rule now would be a dangerous tampering with private rights."

It is said in Railroad v. Platt, 53 O. S., 265-267, that riparian rights are of a permanent character.

We submit that neither the legislature nor judiciary has powet to declare navigable those waters which are not navigable, or to declare waters to be those of an open bay which at the time of the sale by the Government and the state and the purchase by the plaintiff had been surveyed and platted by the Government as bordering upon the Sandusky River and Muddy Creek.

Further, we submit that not only by the rule of property established in Ohio in regard to the riparian rights of those persons having lands upon navigable streams, did plaintiff acquire rights of which it cannot be deprived by judicial decree without just compensation, but the federal statute (Sec. 2476, Rev. Stat.) expressly conferred upon plaintiff the ownership of the bed of Muddy Creek, in which defendants are now claiming public rights.

Muddy Creek never was and never can be navigable in a legal sense. Bourne did not so find it, and the Government has never regarded it navigable.

Hence, we submit, by the patents of the United States, plaintiff's predecessors in title to lands bordering upon the creek, became pro-

prietors of the bed, and plaintiff is the owner thereof without any aid from the property rule in Ohio.

Sandusky River being navigable, with the aid of this rule of property, it has ownership of the bed, with the riparian rights of exclusive fishing and hunting. Nor does the size of the river at its mouth diminish those rights or impair them. "To hold that it did," says the court in *Jones v. Soulaud*, 24 How., p. 65, "would be a dangerous tampering with riparian rights, involving litigation concerning the size of rivers as matter of fact, rather than proceeding on established principles."

The court will note that while the right of fishing was the only right asserted by defendants, that the Supreme Court of Ohio has by its judgment deprived plaintiff of its lands by declaring that these waters are of a public bay. But it is also true that to deprive it of its exclusive right of fishing is to deprive it of property within the meaning of the State and Federal Constitutions.

In *Callen v. Electric Light Co.*, 66 O. S., 176-177, the court says that the word "property," as used in the bill of rights of Ohio, for the taking of which just compensation shall be made, denotes

"Certain rights in things which pertain to persons and which are created and sanctioned by law. They are, the right of user, the right of exclusion and the right of disposition, * * * and include every valuable interest which can be enjoyed as property and recognized as such. * * * * * * * *

"The constitutional provisions of the United States and of the several states which declare that private property shall not be taken for public use without just compensation, were intended to establish this principle beyond legislative control. It is not necessary that property should be absolutely taken, in the narrowest sense of that word, to bring the case within the protection of this constitutional provision. There may be such a serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the Constitution."

"This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation.

Yates v. Milwaukee, 10 Wall., 504.
Pumpelly v. Green Bay Co., 13 Wall., 166.

This the State Courts have also uniformly held.

Shedd v. Fuller, 161 Ill., 462.
Clark v. Improvement Co., 45 Neb., 799.
People v. Platt, 17 Johns., 195.
Morgan v. Kirby, 18 Barb., 277.
Hall v. Alford, 114 Mich., 165.
Grand Rapids v. Powers, 89 Mich., 116.
Bell v. Gough, 3 Zabr., 624.

Water Co. v. Raff, 36 N. J. L., 335.
Norfolk v. Cooke, 27 Gratt., 430.
Munroe v. Ivie, 2 Utah, 535.
Pomeroy on Riparian Rights, Sec. 159.

The Supreme Court of Ohio has declared the legislature cannot thus deprive citizens of these rights without due process of law and just compensation. No more can the courts, as the requirements of Federal Constitution extend to judicial as well as to legislative action of States.

Scott v. McNeal, 154 U. S., 34.
C. B. & Q. R. v. Chicago, 166 U. S., 226.
Blake v. McClung, 172 U. S., 260.

The Constitution of the United States stands between plaintiff and this judicial decision, which deprives it of its property, and upon its protection plaintiff may rely, particularly as its assurance of good title was given by the surveys and patents of the United States. The judgment of the Supreme Court of Ohio is all the harder to bear because it is not supported by a syllable or scintilla of evidence, but is contrary to all the testimony and the finding of facts by the Court.

If this Honorable Court take the views we have expressed as correct, there may be no necessity, in view of the findings of fact of the Court with reference to the title of plaintiff and the Government surveys, to discuss the questions raised by defendants, but in a proper presentation of the case it becomes our duty to meet those questions made in the State Court and which doubtless will be made here.

XI.

EFFECT UPON THE GRANTS OF THE MEANDER LINES ALONG SANDUSKY RIVER AND MUDDY CREEK AND THE MAKING OF SOME SECTIONS FRACTIONAL.

The law of 1796 provided that the sections should contain 640 acres as near as possible, and that fractions of sections should also be noted, when the making of full sections was interfered with by the course of navigable rivers. By the act of 1805 the acreage in these fractional sections was to be returned.

The government surveyor designated some of the sections fractional which border upon Sandusky River.

Defendants contend that as the surveyor returned some sections as fractional and as they were subsequently sold and conveyed as such, the grant did not convey any title beyond the meander lines.

Plaintiff contends:

"Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuousities of the banks of the stream, and as the means of ascertaining the quantity of land in

the fraction subject to sale, and which is to be paid for by the purchaser.

"In preparing the official plat from the field-notes, the meander line is represented as the border line of the stream, and shows, to a demonstration, that the watercourse, and not the meander line, as actually run on the land, is the boundary."

Railroad v. Shurmeir, 7 Wall., 287.

The Supreme Court of Ohio has adopted the above language.

June v. Purcell, 36 O. S. 396.
James v. Howell, 41 O. S. 696.

The case has been uniformly followed;

Hardin v. Jordan, 140 U. S., 371.
Land Co. v. Jeffries, 40 Fed., 386.
Palmer v. Dodd, 64 Mich., 474.
Fuller v. Dauphin, 124 Ill., 544.
Ladd v. Osborne, 79 Iowa, 93.
Sphung v. Moore, 120 Ind., 352.
Knudsen v. Omanson, 10 Utah, 124.
Lamprey v. State, 52 Minn., 181.
Freeman v. Bellgarde, 108 Cal., 179.
Sizor v. Logansport, 151 Ind., 626.
Land Co. v. Bigelow, 84 Wis., 157.
Ridgeway v. Ludlow, 58 Ind., 248.

In *Tolleston Club of Chicago v. State*, 141 Ind., 197, the Court holds:

Meander lines are not boundary lines; and where land is conveyed by a governmental division, the whole division, both within and without the meander lines drawn in the original plat—the wet land as well as the dry—passes with the deed; and the fact that the Government's patent specifies the land conveyed as a fractional part of such a division, naming the number of acres, does not change the rule as to the quantity of land conveyed, for the quantity thus named refers to the fact that that division contains only that number of acres of dry land. Where, in such a case, the dry land without the meander is divided into lots by the meander, a patent from the state for one of its lots, describing it by its number and section, conveys the whole of such lot to the opposite section line.

"The description and plat of the original Government survey, filed in the general land office, as made by the Surveyor General from the field-notes, are conclusive; and the section lines and corners, as laid down in the description and plat, are binding upon the general government and upon all other parties concerned."

In deciding this case, the Court said:

"Duly certified copies of the field-notes and plat of the original survey, as well as of the list and description of the lands, as filed in the general land office, were in evidence. Such description and plat, as made by the Surveyor General from the field-notes, are conclusive; and the section lines and corners, as laid down in the description and

plat, are binding upon the general government and upon all other parties concerned.

* * * * * * * * * * * *

"As frequently decided, meander lines are not boundary lines, unless expressly made so in the instrument of conveyance. The full title of the grantor to the whole section or other division named, both within and without the meander line, the wet land as well as the dry, passes with the deed."

* * * * * * * * * * * *

"The term fractional, as applied to the sections named in the patent, refers simply to the circumstance that they do not contain 640 acres each of dry land. As we have seen, however, the sections were fully surveyed; the corners and boundary lines were determined and recorded in each instance. It follows, from what we have already said, and from the authorities above cited, that the conveyance of the fractional sections carried title to the extreme boundary lines of the sections. All was conveyed. There remained to the United States neither upland nor lowland, whether exposed to the surface *or covered by the waters of the marsh or the river.* The state took to the section lines."

In making decision upon the petition for rehearing, the Court said:

"Even, therefore, if the land had not been fully surveyed, and the section lines and corners were not all determined, as urged by counsel for appellee; and even if the survey terminated on the banks or edge of the morass on each side of the river, still the parties purchasing the lots abutting upon this morass, or the meander line, would take to the middle or thread of the stream. *Nor can reservations be implied, in case of conveyances of lands along streams. When, therefore, the Government has surveyed its lands along the bank of a stream, and has sold and conveyed such lands by governmental subdivisions, its patent conveys the title to all islands lying between the meander lines and the middle thread of the river,* unless previous to such patent it has surveyed such islands as governmental subdivisions, or expressly reserved them when not surveyed.'

"*Nor will it do, especially in view of the foregoing authorities, for counsel to say that the meanders in the case before us are not meanders of the river.* The field-notes show that the whole territory between the meander lines was covered with water; while the evidence shows that it is still so covered. The river, so-called, was the central or flowing part of this body of water. Meander lines, from their very nature, being intended to mark the sinuousities of a stream, are run as close to the water as can conveniently be done by the surveyors.

* * * * * * * * * * * *

"*In addition to this, the field-notes actually name the lines as meanders of the river, the language used being, 'Meanders of Calumic River.'*

"The meander is, therefore, merely a mark for the line of the river, being laid off as near to the river bank as the surveyors could work. It means the river, and is not itself a boundary, but only indicates the location of the true boundary, which is the river itself."

We have quoted much of the language of the above case because the court has made such a thorough examination of, and given such an exhaustive opinion upon, the effect to be given the Government surveys and plats in and upon which waters have been located and described as watercourses, when the rights of persons who have subsequently acquired title to lands bordering thereon have been brought into question.

In *Banks v. Ogden*, 2 Wall., 68, it is said:

"It is a familiar principle of law, that a grant of land bordering on a road or river, carries the title to the center of the river or road, unless the terms or circumstances of the grant indicate a limitation of its extent by the exterior lines."

Followed in *Paine v. Consumers Co.*, 71 Fed., 629.

It is said in *Hardin v. Jordan*, 140 U. S., 381:

"It has never been held that lands under water, in front of such grants, are reserved to the United States, or that they can be afterwards granted out to other persons to the injury of the original grantees."

In *Middleton v. Pritchard*, 4 Ill., 510, it is said:

"Where the Government makes a grant, and does not reserve any right or interest that could pass by the grant, the grant must be intended to include all that might pass by it."

The principle "that whenever the question in any court, state or federal is, whether a title to land which had been once the property of the United States has passed, that question must be resolved by the laws of the United States," has been recognized many times.

Wilcox v. Jackson, 13 Pet., 517.
Railroad v. Land Co., 71 Wis., 99.
Whitney v. Lumber Co., 78 Wis. 240.

And the decisions above cited have been fully approved in

Jefferis v. Land Co., 134 U. S., 196.

In view of these authorities, we submit that the claim made by defendants that plaintiff is limited in its ownership to the land included within the fractional sections, because of the meander lines along Muddy Creek and the Sandusky River, is not founded upon law or reason.

XII.

THE DIFFERENCE IN EXTENT OF WATERS SINCE GOVERNMENT SURVEY OF 1820 DOES NOT CHANGE THEIR CHARACTER.

Defendants contend that although these waters were surveyed as river and creek, they have ceased to be such and have become a bay because the destruction of the banks and the overflowing of the lowlands has given them greater width and changed their form.

We submit that a watercourse does not become a bay because its waters spread over the lowlands adjacent.

Gravel Road Co. v. Harvey, 90 Ind., 192.
Munkres v. K. C. R. R., 72 Mo., 514.
Pyle v. Richards, 17 Neb., 182.
Case v. Hoffman, 84 Wis., 438.
French v. Carhart, 1 N. Y., 107.

The court finds that the current of Muddy Creek is perceptible through what is locally called Mud Creek Bay; that the waters of this creek have overflowed the lowlands and thereby broadened the waters, which, however, narrow down just before the creek empties into the river; that after entering the river they flow in the well-defined current of the river until they have passed Eagle Island. (Rec. p. 43.)

In *Mitchell v. Bain*, 142 Ind., 604, it is said:

"A stream does not cease to be a watercourse, because at certain points it spreads over low ground several rods in width and flows for a distance without a defined channel or banks before flowing again in a definite channel. * * * If a watercourse is lost in a swamp or lake it is still a watercourse, if it emerges therefrom in a well defined channel."

"That the banks of a stream are not everywhere clearly and sharply defined is not controlling. The character of the country through which the stream flows must be taken into account. Where the country is hilly and rolling, the fall rapid and the soil easily cut and washed, there will in general be a well marked channel. Where, however, the country is flat, the fall slight, and the soil turfy and full of roots and strong grass, there the channel will often be shallow and the sides in many places not sharply defined."

It was said in *Macomber v. Godfrey*, 108 Mass., 219, the mere fact that the water of a stream spreads over a wide surface without apparent banks, because of the level character of the land, does not deprive it of the character of a watercourse, provided it usually flows in a continuous current.

In *Rigney v. Tacoma Light & Water Co.*, 9 Wash., 578, it was held:

"The fact that a stream widens into a marsh or a swamp will not deprive it of its character as a natural watercourse, if it continues its current through the swamp and finally emerges therefrom in a well defined channel."

In the opinion, the court says:

"In a leading and well considered case in Wisconsin, the Supreme Court of that state held that the fact that a stream spreads over wide reaches of marshes and swamps, on or below the surface, did not militate against its being a watercourse in every essential particular so long as it could be identified as the same stream. And the identity of the stream through the marshes and swamps was in that case disclosed solely by its current, there being no defined channel or channels whatever."

Case v. Hoffman, 84 Wis., 438.

"The different channels or creeks separating and flowing around intervening islands in the stream, though, in local usage, receiving different names, are a part of 'the river,' not less than the main channel itself."

Schermerhorn v. H. R. R. R., 38 N. Y., 103.

"The waters of Sandusky River and Muddy Creek are not only identified by their channels and currents, but also by their old banks which have become submerged and are now covered with aquatic and lowland vegetation.

We submit that the erosion and wearing away of the low banks and the consequent widening of the streams by the creation of shallows between their channels and banks has not changed them from river and creek to a bay.

XIII.

CALLING THE WATERS A BAY DOES NOT MAKE THEM ONE.

Defendant also asserts that the waters are to be considered those of a bay because at the place where Muddy Creek has broadened over the lowlands it is locally known as "Mud Creek Bay."

It is held in *State v. Gilmanton*, 14 N. H., 467:

"In general, if in a body of water there be a steady uniform current, it will be a river."

The court says (477):

"The name cannot alter the thing; it cannot be received as a proper definition of the character of the water. This may be called Sanborton Bay or the Straits of Gibraltar, but still it may be a river. Sanborton Bay is a local appellation, which conveniently enough points out the particular water of which a person may be speaking; but this water is clearly not a bay and cannot be called so with any attention to geographical correctness. A bay is a bending or curving of the shore of the sea or a lake. * * * As a matter of convenience, we may apply to water that name to which custom has familiarized us; but when it becomes necessary to determine what a particular body of water actually is, we cannot disregard the etymology of the term used to designate it."

Hence, we submit, the fact that part of the waters are locally known as "Mud Creek Bay" can have no weight in this controversy.

The evidence, however, is without conflict that the waters *east of Squaw Island* were never even locally known as "Mud Creek Bay."

XIV.

THE RISE AND FALL OF THE WATERS.

In common with all watercourses flowing into the Great Lakes and their estuaries at a general level, these waters rise and fall with those of Lake Erie and Sandusky Bay *when the latter are affected by the winds.*

From this fact defendants claim the waters are those of a public bay connected with Sandusky Bay.

It is not disputed that there is a current in these waters which carries them into Sandusky Bay, when unaffected by the wind; that the waters of Sandusky River, as far as Fremont, *twenty-five miles from its mouths,* rise and fall with those of Lake Erie and Sandusky Bay when affected by the wind. With these facts, it is difficult to see anything of reason in defendant's contention, for if waters conceded to be those of Sandusky River rise and fall, the fact that waters nearer Sandusky Bay rise and fall likewise does not tend to prove they are not waters of the river.

The question raised is fully answered in *Knight v. Association*, 142 U. S., 176, in which Mr. Justice Field (p. 207) said:

"In addition to this fact it may be observed that at the time the Circuit Court was not ignorant of the universal rule governing the measurement of waters, to which the Supreme Court of the state makes no reference in its decision, and of which it seems to have been entirely oblivious, that where a water of a larger dimension is intersected by a water of a smaller dimension, the line of measurement of the first crosses the latter at the points of junction, from headland to headland. The existence of tide lands in the intersecting water in no respect affects the result. For illustration, in the measurement of a body of water like Long Island Sound, when the Connecticut River is met the line of survey does not follow up that river to Hartford because the tide is felt at that place, but it crosses the mouth of the river from headland to headland. So, too, the measurement of Chesapeake Bay does not include the Potomac River up to Washington because the tide is felt at the site of the capital. It would be absurd to include in the measurement of the bay of San Francisco the waters of the river Sacramento as far as the city of that name, nearly a hundred miles above the bay, because the tide is felt there, or to embrace the river San Joaquin as far as Stockton because the tide reaches to that place. This is so plain that is excites surprise that any question should have been made upon the subject. And if a river extending a hundred miles or more could not be included in the bay, even though affected by the tides, neither can a stream of less dimensions, though not exceeding over one or two miles."

In *Hooker v. Cummings*, 20 Johns. (N.Y.), 90, it was contended that the Salmon River was public because in it the waters rose and fell with those of Lake Ontario, yet the court held that fact did not change the character of the river.

Nor does the rise and fall of the waters with Sandusky Bay destroy their private character and impress upon them a public one. This rise and fall occurred in waters decided to be private in

Fuller v. Shedd, 161 Ill., p. 472.

In *Rice v. Ruddiman*, 10 Mich., 138, Judge Christiancy, in passing upon the question whether certain waters were to be treated as the widening of Muskegon River or an arm or estuary of Lake Michigan, said:

"The only circumstance which I have been able to discover, tending to give it the character of the latter, is the fact that it rises and falls with it. If this fact were sufficient to make it a part of Lake Michigan, then it is difficult to see why every other stream, large or small, which empties into that lake, should not be considered part of it so far up as as it is affected by the rise and fall of the lake. The rise and fall of Lake Michigan, and the other great lakes of the same chain, is not a tide occurring at regular intervals, like that of the ocean, nor does it rise from the same cause. And though it is probable their waters may be slightly affected by lunar attraction, and a very minute tide may perhaps be detected by a long and careful course of observation with accurate instruments; yet the court must judicially notice that it must be too slight to be recognized by ordinary observation, or to serve any practical purpose in determining the extent of riparian ownership. This fact was judicially noticed in *Lorman v. Benson*, 8 Mich., 18. Courts must also be presumed to be so far acquainted with the laws of nature as to enable them judicially to determine that the rise and fall of these lakes are governed mainly by the same causes which affect the rise and fall of the rivers which flow into them, and which rise and fall more than the lakes themselevs; and that all the connecting straits between the lakes, such as the straits of Ste. Mary (or Ste. Mary's River), the St. Clair and Detroit Rivers, must, of necessity, rise and fall with the lakes which they connect."

So we submit that the fact that the waters or rivers flowing into Lake Erie and the large bays which are estuaries thereof, and having their mouths at a general level with those of the larger bodies of water into which they empty, rise and fall with the larger bodies consequent upon the action of the wind, does not convert them into bays, or make them public, as claimed by defendants.

In this case the Circuit Court (Rec. 44) states that the cause of this rise and fall is the wind in its action upon the waters; that when it is from the southwest the waters fall, and when it is from the northeast the waters back up; that "*when there are no disturbing causes the waters flow in the channel sufficiently to carry off the waters coming down the river.*"

XV.

THE CLAIM THAT THE PUBLIC FISHED A LONG TIME IN THESE WATERS.

This claim is made in the answer. There is no evidence to support it and the court does not so find.

"But the custom proposed to be proved is not one that could be sustained by law, even if especially pleaded; for a custom to take anything from another's land, or for a profit *a prendre*, is not a lawful custom."

Waters v. Lilley, 4 Pick., 148.

McFarlin v. Essex Co., 64 Mass., 310.

"The fact that for many years the public have gone on creeks traversing private lands, without hindrance, does not create any right."

Chisholm v. Caines, 67 Fed., 285.

Moulton v. Lilly, 37 Me., 493.

In *Cobb v. Davenport*, 32 N. J. L., pages 387, 389, the court says such a claim would be monstrous.

"The right of fishing being a profit *a prendre*, in another's soil, as distinguished by an easement, cannot be claimed by custom."

We submit, therefore, there is no element of legal right in any such claim, even if there were any evidence to support the allegation of their answer, which there is not.

XVI.

CONCLUSION.

The result of the decision of the Supreme Court has been to dispossess plaintiff of property, much of which has been in its possession for fifty years or more, and opening to the public lands and waters which upon the finding of facts by the courts, belong to plaintiff, and upon which it has expended thousands of dollars to improve and protect.

The judgment of the Supreme Court of Ohio we can, with great respect for that court, say was arbitrarily made, in disregard of the facts found, and the injustice of the decision is particularly hard to bear in view of the findings by the court—that as matter of fact the waters are those of Sandusky River and Muddy Creek, but, as matter of law, they are not.

We are not asking this court to consider any other facts than those found by the courts of Ohio. We are asking this Court to reverse the judgment of the Supreme Court of Ohio because that court has ignored the facts found; because it has disregarded the surveys and patents of the United States, which this Court has said repeatedly are binding upon the State courts; because it has denied the title and rights of plaintiff acquired under statutes of the United States; because it has taken from plaintiff, without due process of law and without compensation, a large area of property and opened it to the public for public use, in contravention of those provisions of the Constitution of the United States which prohibit such action. For these reasons we pray the Court to issue such mandate as will protect plaintiff in the enjoyment of property acquired under the Acts of Congress of the United States, its surveys, plats and patents.

Respectfully submitted,

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14231

In the Supreme Court of the United States.

No. 153.

THE WINOUS POINT SHOOTING CLUB,
Plaintiff in Error,

vs.

JEPPE CASPERSEN, PETER PETERSEN,
WILLIAM DECKER and
CHARLES PETERSEN,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

I.

STATEMENT OF FACTS.

The Circuit Court in the case of Bodi vs. The Winous Point Shooting Club, 20 O. C. C. 637., held that the territory in dispute was a part of Sandusky River and Mud Creek and enjoined Bodi from fishing and hunting thereon, upon the theory that the Shooting Club owned the lands by riparian ownership. Bodi prosecuted error to the Supreme Court of Ohio upon the findings of fact made by the Circuit Court without a bill of exceptions containing the evidence. The Supreme Court reversed the Circuit Court as to the public right of fishing holding that the waters in dispute were a part of a public bay and not parts of the Sandusky River and Mud Creek.

The court did not disturb the finding as to hunting because the finding of fact set out that the Sporting Club owned the lands under the water.

But the findings did not show that it was by virtue or riparian ownership.

The Circuit Court in this case followed the Supreme Court in the Bodi case and held that the waters in dispute were a

navigable public bay and that the Sporting Club did not own the lands under such waters, and that the public right of fishery existed therein. The Supreme Court of Ohio affirmed that judgment upon both the facts and the law.

2.

THIS COURT HAS NO JURISDICTION TO REVIEW THE JUDGMENT OF THE STATE COURT.

To give this court jurisdiction of a writ of error to the state court it must appear affirmatively, not only that a federal question was presented for decision of the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.

County of Cook v. Calumet and Chicago Canal and Dock Co. 138 U. S. 635-637.
Detroit City R. R. Co. v. Guthard 114 U. S. 133.
De Saussure v. Gaillard 127 U. S. 216.
Kansas Endowment and Benev. Asso. v. Kansas 120 U. S. 103.
Church v. Kelsie 121 U. S. 282.
McDonough v. Millander 44 U. S. (3 How.) 693.

This court will not entertain jurisdiction of state judgments where, beside the federal question decided by the state court there is another and distinct ground upon which the judgment can be sustained.

Kennebec and P. R. Co. v. Portland and K. R. Co. 81 U. S. 14 Wall. 23 (20:850)
Rector v. Ashley 73 U. S. 6 Wall. 142 (18:733)
Gibson v. Chouteau 75 U. S. 8 Wall. 314 (19:317)
Klinger v. Missouri 80 U. S. 13 Wall. 257 (20:635)
Moore v. Mississippi 88 U. S. 21.

Alleged errors of a state court which involves questions either of fact or of state and not federal law are not reviewable in the United States Supreme Court on writ of error.

Quimby v. Boyd. 128 U. S. 488.

A real and not a fictitious Federal question is essential to the jurisdiction of this court over the judgment of state courts. The bare averment of a Federal question is not sufficient. There must be at least color of ground for such averment.

Hamblin v. Western Land Co. 147 U. S. 530.

In the findings of fact of the circuit court, the court found that the plaintiff club were in the "actual possession of so much of the lands, marshes and shores described in the petition (Ex-

cept Section 35) as described and comprised in the sections and fractional sections described in the survey and map made by Sylvanus Bourne." (Record, p. 28.)

The court finds that the plaintiff club was not in possession and did not own the lands covered by the waters of Mud Creek Bay. The state circuit court further found that much of said property so surveyed in said fractional sections aforesaid is now submerged and over-flowed land, and much was marsh land at the time of said survey, and was acquired from the State of Ohio, directly or indirectly through plaintiff's grantors and predecessors in title under what is known as the "Swamp Land Acts." The other lands, i. e. those not granted by the state as swamp lands, were patented by the government to the plaintiff's predecessors in title. "(Rec. pp. 29-30.) The court will observe that the territory in dispute in this case is not embraced within the sections and fractional sections mentioned in said findings of fact, but all the waters in dispute in this case lie beyond the shore line of said sections and fractional sections. (Rec. p. 35.)

The finding of the circuit court as to swamp lands in the fractional sections being acquired from the State of Ohio is sustained by the record but the finding that the other lands were patented by the government to the plaintiff's predecessors in title is not sustained by the record and is an erroneous finding, there being no patents from the government nor anything equivalet thereto shown by the record. The plaintiff in error cannot take advantage of an erroneous finding in its favor. The findings of fact are more favorable to the plaintiff in error than the facts in the record warrant.

"The state has full power of disposition of the swamp lands granted to it and the application of the proceeds to the purposes of the grants rests upon the good faith of the state which might exercise its discretion as to its disposal.",

County of Cook v. Calumet and Chicago Canal and Dock Co., 138 U. S. 635-655.

3.

THE QUESTION AS TO WHETHER OR NOT RIPARIAN OWNERSHIP WILL BE PERMITTED AND THE EXTENT OF SUCH OWNERSHIP PROPERLY BELONGS TO THE STATES BY THEIR INHERENT SOVEREIGNTY.

"Grants of the government for lands bordering on tide waters extends only to high water mark, the title to the shore and lands under water in front of lands so granted insures to the state within which they are situated.

"Grants of the government for lands bounded on streams or other waters without any reservation or restriction of terms are to be considered as to their effect according to the law of the state in which the lands lie."

Hardin v. Jordan, 140 U. S., 371-406.

"Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state——a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery——and cannot be retained or granted out to individuals by the United States."

Hardin v. Jordan 140 U. S., 371-406.
Pollard v. Hagan 44 U. S., 3 How. 212 (11:565.)
Goodtitle v. Gibbe, 50 U. S., 9 How. 471 (13:220.)
Weber v. Board of Harbor Comrs. 85 U. S., 18 Wall. 57 (21:798.)

"The state may even dispose of the usufruct of such lands as is frequently done by leasing oyster beds in them and granting fisheries in particular localities; also by the reclamation of submerged flats, etc."

Hardin v. Jordan 140 U. S., 371-406.
Manchester v. Massachusetts 139 U. S., 240 (35:159.)
McCready v. Virginia 94 U. S., 391 (24:248.)
Martin v. Waddell 41 U. S., 16 Pet. 367 (10:997.)

And the state may refuse to do so and hold the right of fishing to be public and this court has no jurisdiction to review such a judgment.

4.

THE PUBLIC RIGHT OF FISHERY IN THE WATERS IN DISPUTE IN THIS CASE EXISTS IRRESPECTIVE OF THE OWNERSHIP OF THE SOIL.

The supreme court of Ohio in this case affirmed the judgment of the circuit court on the authority of

Bodi v. Winous Point Shooting Club 57 O. S. 226.

And in the case of Bodi, et al. v. Winous Point Shooting Club, 57 O. S., 226, the court held that the public has the right of navigation and fishing in the navigable waters of the open bays of Lake Erie in this state Sloan v. Biemiller, 34 O. S., 492, followed and approved. In Sloan v. Biemiller, supra, the court held "that fishery in such waters as Lake Erie and its bays should be as free and common as upon tide waters and alike subject to the control by public authority is obviously just. The reasons for regarding the right as public is as great in one case as in the other; and we have no hesitation in saying that the right of fishing in these waters is as open to the public as if they were subject to the ebb and flow of the tide," and on page 513 the court, quoting Angell on Tide-waters, say, "Fishery in

the sea and in the waters which are made to flow inland therefrom by its egress and influence, consisting as it does, a great source of sustentation, has in all ages and in all countries been deemed of such importance that it has ever been regarded a privilege open and common to all persons.

The same rule is laid down in Hogg v. Beerman, 41 O. S. 81., and The East Harbor Sportsmans Club v. Kelting, 37 W. L. B., 259 56 O. S., 746.

It will thus be seen that the Supreme Court of Ohio applies the doctrine of Sloan v. Biemiller, 34 O. S., 492 to all the waters in dispute, and as such waters rise and fall with Lake Erie, any further inquiry into their character is immaterial.

Justice Field, in delivering a very learned and exhaustive opinion in the case of Ill. C. R. Co., v. Ill., 146 U. S., 387, 36 L. Ed. 1018, stated the law to be: "The Great Lakes are not, in any appreciable respect, affected by the tides, and yet on their waters*****a large commerce is carried on, exceeding in many instances, the entire commerce of States on the borders of the sea.

When the reason of the limitation of admiralty jurisdiction in England was found inapplicable to the condition of navigable waters in this country, the limitation and all its incidents were discarded. So, also, by the common law, the doctrine of the dominion over and ownership by the crown, of lands, within the realms under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, "tide-waters" and "navigable waters"*****being used as synonomous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the Crown, which could alone exercise such dominion over the waters as would insure freedom in their use, so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public, the use of navigable waters from private interruption and encroachment. A reason as applicable to navigable fresh waters as to the waters moved by the tide. We hold, therefore, that the same doctrine as to the dominion and sovereignty over, and ownership of the lands under navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over the ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other and subject to the same trusts and limitations."

The Supreme Court of Michigan in the case of People v. Silverwood, decided in 1896, 32 L. R. A., 694, after quoting the above language of Justice Field, say "That the reasoning of the case is without flaw and that the law enunciated ought to stand as the law of this State. It commends itself to one's reason and

judgment and avoids many difficulties incident to a different construction of the law. The doctrine too, is in harmony with all decisions of the States bordering on these Great Seas.".

Justice Field also says in the same case (146 U. S., 387,) "that it is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein free from the obstruction or interference of private parties."

In McLennan v. Prentis, 85 Wis., 444, the territory in question was a lot or parcel of land lying beneath a shoal bay connected with Lake Michigan. The court held that "lands lying under shoal waters of the Great Lakes and between the banks and navigable waters, are held by the State in trust for the public purposes of navigation and fishing."

"The rights which the State holds in these lands is in virtue of its sovereignty and in trust for the public purposes of navigation and fishing."

The American and English Encyclopedia of Law, Vol. 4, 2nd. Ed., beginning on page 823, under the subject of "Boundaries," gives a very full and complete summary of authorities upon the question of riparian ownership in the United States.

"There is no uniformity of decision in the courts throughout the United States. In some cases the courts have carried the boundary of lands abutting on navigable rivers to the "Medium Filum Aquae." American and English Encyclopedia of Law, Vol. 4, p. 823. See Sloan v. Biemiller, 34 O. S., 511.

The principle has sometimes been laid down that deeds conveying lands bordering upon fresh water navigable rivers are presumed to extend the boundaries only to the bank or ordinary "high water mark thereof." American and English Encyclopedia of Law, Vol. 4, pp. 824 and 825. See the cases cited in United States, California, Arkansas, Iowa, Kansas, Missouri, Oregon and Vermont, on pages 825 and 826.

"There are many cases which hold that the boundary of lands abutting on fresh water navigable rivers in the United States, extends to low water mark." Supra, p. 826. Citing a great number of cases in Indiana, Minnesota, New Jersey, Pennsylvania, Tennessee, Virginia and West Virginia.

Summary of authorities as to proper rule applicable to navigable rivers.,

"There has been little attempe made in this country, except in a few cases, to maintain or enforce any uniform principle in regard to the ownership of the soil of navigable rivers or the boundaries of lands abutting upon them. The trouble has arisen from the application of the common-law definition of a navigable river, and the result is the conflict of authority and confusion which prevails now. What seems to be the soundest law is set out below." American and English Encyclopedia of Law, Vol. 4, p. 827.

"The 9th section of the Judiciary Act, 1789, by which the first court of admiralty was established, declares that the district courts shall have exclusive cognizance of all civil cases of admiralty and maritime jurisdiction, including all seizures under the laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts, as well as upon the high seas."

This Act of Congress is quoted by Taney, C. J., in his judgment in The Propeller Genesee Chief v. Fitzhugh, 12 How. (U. S.) 457, and is made the basis of that judgment. Following these are the decisions of the United States Supreme Court in the cases of the St. Paul, etc., R. Co. v. Shurmeir, 7 Wall. (U. S.) 272 and in Barney v. Keokuk, 94 U. S. 324, in which the latter court, by Bradley, J. said: "The confusion of navigable with tide-water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British Islands and that of the American Continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas, and under the like influence it laid the foundation in many states, of doctrines with regard to the ownership of the soil in navigable waters above tide water at variance with sound principles of public policy. Whether as rules of property it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several states themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject, the correct principles were laid down in Martin v. Waddell, 16 Pet. (U. S.) 367: Pollard v. Hagan 3 How. (U. S.) 212; and Goodtitle v. Gibbe, 9 How. (U. S.) 471.

These cases relate to tide water, it is true, but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of The Propeller Genessee Chief v. Fitzhugh, 12 How. (U. S.) 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters.

It properly belongs to the states by their inherent sovereignty; and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water.

The cases in which the court has seemed to hold a contrary view depended, as most cases must depend, on the local laws

of the states in which the lands were situated. In Iowa, as before stated, the more correct rule seems to have been adopted after a most elaborate investigation of the subject. The exhaustive examination of this question by the Supreme Court of Iowa, in 1856, in the case of McManusy v. Carmichael, 3 Iowa 1, really leaves nothing to be said. The precise point was directly before the court——namely, whether the title of the riparian proprietor extends below high water, in the Mississippi River; and is was decided that it does not. This decision has been followed by subsequent cases, especially the case of Haight v. Keokuk, 4 Iowa, 199, and Tomlin v. Dubuque, etc. R. Co., 32 Iowa, 106, 7 Am. Rep. 176

The above enactment and the judgments here given, although they conflict with the ruling of the Supreme Court of the United States in the case of Jones v. Soulard, 24 How. (U. S.) 41, and with a whole host of local cases which adopt the common law rule of the "filum aquae" even in the case of the great rivers, established what seems to be the true principle of American law in regard to the proprietorship of the soil in the beds of fresh water navigable rivers in the United States, and the boundary of land owners abutting upon them; that is, that the soil of the fresh water navigable rivers belongs to the states which border on them below high water mark, by virtue of their inherent right of sovereignty, and that the boundary of the riparian owners is properly limited by the same line. Whenever there is any departure from this rule it is sporadic and local; and, speaking broadly, it is founded neither in good sense nor in sound law. This doctrine in regard to the boundary of lands abutting on the fresh water navigable rivers of this country is directly subversive of the rule of the common law of England in regard to the "filum aquae" which in reason and nature is not applicable to the conditions in the United States."

4 Am. and Eng. Encyc. of Law, 2nd. Ed., p. 827.

5.

RULE IN ENGLAND AS TO FISHING IN NAVIGABLE WATERS.

In England the soil of navigable tidal waters within the territorial limits of the State, as far as the tide flows and reflows, is "prima facie," in the Crown, and the right of fishing is, prima facie," in the public.

Hale, De Jure Maris, C. 4.
Malcolmson v. O'Dea, 10 H. L. Cas., 593.
Smith v. Andrews, (1891) 2 Ch. 678.
Blount v. Layard, (1891) 2 Ch. 681, note 3.
Peace v. Scotcher, 9 Q. B. div. 162.

Blower v. Ellis, 50 J. P., 326.
Reg. v. Stimpson, 4 B. and S., 301, 116, E. C. L. 301.
Carlisle v. Graham, L. R. 4 Exch. 361.
Blundell v. Catterall, 5 B. and Ald. 304, 7 E. C. L. 108.
Oxford v. Richardson, 4 T. R. 437.
Carter v. Murcot, 4 Burr, 2162.
Richardson v. Oxford, 2 H. Bl. 182. 1 Anstr. 231.
Ward v. Creswell, Willes 265.
Warren v. Mathews, 6 Mod. 73. 1 Salk 357.
Fitzwalter's Case, 1 Mod. 105.
Royal Fishery of the Banne, Davies Rep. 149.
Crichton v. Collery, 19 W. R. 107.
Murphy v. Ryan, 2 Ir. C. L. Rep. 143.
13 Am. and Eng. Encyc. of Law, 2nd. Ed., p. 560.

Before Magna Charta the Crown could grant the exclusive right of fishery in tidal waters to a private individual either together with or distinct from the soil. Magna Charta prohibited for the future, the grants of exclusive fisheries in tidal waters.

13 Am. and Eng. Encyc. Law, Vol. 4. p. 561.
2 Black Com. 39, 417.
4 Black. Com. 424.
Gann v. Free Fishers, 11 H. L. Cas. 209.

6.

RULE ADOPTED IN THE AMERICAN COLONIES AND IN THE UNITED STATES.

The charters granted by the Crown of England to individuals for the purpose of enabling them to plant colonies on the North American Continent, are construed according to the common law of England and it was held that the lands under the navigable waters within the territories included in such charters were held by the grantees, as the soil under navigable waters of England is held by the Crown, subject to the public right of fishing.

After the Revolution took place, the people of each State became themselves Sovereign and held absolute right to all navigable waters within their territorial limits including the fisheries in such waters.

13 Am. and Eng. Encyc. of Law, 2nd. Ed., p. 562.
Arnold v. Mundy, 6 N. J. L., 1, 10 Am. Dec. 356.
Martin v. Waddell, 16 Pet. (U. S.) 367.
Den v. Jersey Co., 15 How. U. S., 246.
Church v. Meeker, 34. Conn. 421.
Moulton v. Libby, 37 Me. 472, 59, Am. Dec., 57.
Com. v. Roxbury, 9 Gray (Mass.) 451.
Weston v. Simpson, 8 Cush. (Mass.) 347.

Wooley v. Campbell, 37 N. J. L., 163.
Tinicum Fishing Co. v. Carter, 61 Pa. St., 21, 100 Am. Dec. 597.

The court say in Arnold v. Mundy, 6 N. J. L., p. 90, after reviewing the English authorities on the right of the public to fish, that, "on comparing all of the above authorities and the reasons on which they are founded, we are compelled to acknowledge that although the Kings of England formerly may have lavished on favorites or rewarded the services of individuals with any franchises entrusted to them for the public benefit, yet, the people ever considered it a violation of good faith, an unlawful infringement on their common rights, and as destructive alike to their liberties and their interests until the evil increasing beyond endurance they, sword in hand, forced from their king, the most solemn and public declaration of their rights in Magna Charta."

In Parker v. People, 111 Ill., 590, the court say: "There are some things that are incapable of individual ownership, such as air and water. All may and do participate, without restraint, in their enjoyment. They are the common inheritance of mankind. There are other things, to a large extent incapable of individual ownership, and these are game and fish; they belong to all equally*********

The public right of fishing in the navigable waters in the United States resides in the people of the State.

Martin v. Waddell, 16 Pet. (U. S.) 367.
Manchester v. Massachusetts, 139 U. S., 240.
Affirming, 152 Mass. 230.
Schibely v. Bowlby, 152 U. S. 1.
Lay v. King, 5 Day (Conn.) 72.
Procter v. Wells, 103 Mass. 216.
Lincoln v. Davis, 53 Mich. 375.
State v. Roberts, 59 N. H., 256.
Arnold v. Mundy, 6 N. J. L., 1.
Polhemus v. Bateman, 60 N. J. L., 163.
Am. and Eng. Encyc. of Law, Vol. 13, 2nd. Ed., p. 563, note 1.

7.

PUBLIC RIGHT OF FISHING AT COMMON LAW.

It will thus be seen that there is no doubt that by common law, all persons have a common and general right of fishing in the sea and in the waters which are made to flow inland therefrom by its egress and influence, as its bays, estuaries, inlets coves, branches, arms of the sea and in all other navigable or tide waters.

13

Ill. Central R. R. Co., v. People, 146, U. S., 387.
McCready v. Virginia, 94 U. S., 391.
Chalker v. Dickenson, 1 Conn., 382.
Adams v. Pease, 2 Conn., 481.
Mathews v. Treat, 75 Me., 595.
Sollers v. Sollers, 77 Md., 148.
Angell on Tide Waters, Sec. 65.
Woolrych on Waters, Sec. 129.
Peck v. Lockwood, 5 Day, Conn., 22.
Sterling v. Jackson, 69 Mich. 518.
Mathew v. Chapman, 40 Conn., 399.

8.

COMMON LAW RULE ADOPTED IN OHIO

Sloan v. Biemiller, 34 O. S. 492.
Bodi, et al., v. The Winous Point Shooting Club, 57 O. S. 226.
Hogg v. Beerman, 41 O. S. 81.
East Harbor Sportsmans Club v. Kelting et al., 37 W. L. S., 259, 56 O. S., 746.

And we contend that this public right of fishery exists in these waters whether they be river or bay, according to the law of Ohio which is conclusive.

9.

WATERS IN DISPUTE IN THIS CASE ARE A PUBLIC NAVIGABLE BAY CONNECTED WITH LAKE ERIE AND ARE NOT PARTS OF THE SANDUSKY RIVER AND MUD CREEK.

All the waters in dispute in this case, which are those waters lying west of a line drawn from Slade's Point to a point at the east end of Eagle Island and thence to South Point, and between Squaw Island on the south, Horseshoe Island on the west and the shore line of the bay on the north, and lying between the shores, aforesaid, form part of a public bay and are not parts of the Sandusky River and Mud Creek; and being parts of an open bay, and navigable, as aforesaid, the defendants, as members of the public, have the right of navigation and fishing in said waters. 45)

This is the second conclusion of law of the Circuit Court in this case and we claim it to be a correct statement of the law; and under the evidence of the case there are none of the elements of a river in the territory in dispute.

10.

DEFINITION OF A RIVER.

Houck says, in his work on rivers, Section 1, page 1:

"Lexicographers have defined a river to be "a large stream of water flowing in a channel on land toward the ocean, a lake; or another river."

The word is derived from the old French word "riviere" meaning a bank, a shore, or rather a country on the banks of a river.

Webster's Dict. "River."

American Encyclopedia, "River."

In legal language, a river has been defined by Wollrych to be "a running stream, pent in on either side with walls and banks."

Houck on Rivers, Sec. 2, page 1.

Every river consists of water, bed and banks.

Gavitt v. Chambers, 3 Ohio, 498.

Gould on Waters, Sec. 41, says " a river is a running stream of water pent in on either side by banks, shores or walls." Every river consists of (1) banks, (2) the bed, (3) the water."

Angell on Watercourses, Sec. 3 and 4 and notes.

Gavitt v. Chambers, 3 Ohio, 498.

Justice Curtis says, in Howard v. Ingersoll, 13 How. 426, "the banks of a river are those elevations of land which confine the water when they rise out of the bed."

McCullough v. Wainwright, 14 Penn. St., 171.

A river is said to be pent in by walls or banks and is thus contra-distinguished from a sea or a bay which encompasses the land, rather than is encompassed by it.

A bank is defined to be a steep declivity rising from a river, lake or sea.

Webster Def. "Bank."

Bouvier says: "Banks of rivers contain the river in its natural channel when there is the greatest flow of water."

Bouvier Law Dict.

Mr. Justice Story defines shores or flats to be the space between the margin of the river in a low stage and the banks which contain it in its greatest flow, thus distinguishing flats or shores from banks.

Thomas v. Hatch, 3 Summ., 178.

Chief Justice Marshall says: "The shores of a river border on the water's edge."

Handley's Lessee v. Anthony, 5 Wheat., 374, 385.

"If the shore borders on the edge of the water, it must extend outwards to the bank and, therefore, cannot be the bank which, in certain stages of the river, it separates from the water's edge."

15

A river, then consists of water, a bed, and banks; these several parts constituting a river, the whole river. It is a compound idea; it cannot exist without all of its parts.

11.

WATERCOURSE DEFINED.

A watercourse is defined, in Vol. 28, Am. and Eng. Encyc. of Law, on page 944, as "A stream of water usually flowing in a definite channel having a bed and sides, or banks, and discharging itself into some other stream or body of water." There must be, ordinarily, a moving body of water.

In Jeffers v. Jeffers, 107 N. Y. 651, a watercourse is defined as "a living stream with defined banks and channels."

Joliet, etc. R. R. Co. v, Healy, 94 Ill., 416.

Gillett v. Johnson, 30 Conn. 180.

"The bank of a stream is the continuous margin where vegetation ceases." 2 Harris, 171. This means land vegetation, not aquatic grasses which grow during but few months of the year and which will grow in six feet of water (58.)

12.

A BAY DEFINED.

In Vol. 3, Am. and Eng. Encyc. of Law, 2nd. Ed., page 899: "A bay is defined as opening into the land where the water is shut in on all sides except at the entrance." Applying this definition to the waters in dispute, the court will have no trouble, by the aid of the maps and other evidence, in disposing of this case the same as the Supreme Court of Ohio. In State v. Gillman, 14 N. H., 477, in determining the question whether a particular body of water was or was not a river, the court say, "this question cannot be determined by ascertaining what appellations have been given to it. The name cannot alter the thing; it cannot be received as a proper definition of the character of the water."

13.

ARM OF THE SEA DEFINED.

The court say, in Attorney-General v. Delaware, etc. R. R. Co., N. J. Eq. 635. "A bay is an arm of the sea distinct from a river." "An arm of the sea is a portion of the sea projecting inland, in which the tide ebbs and flows: it included bays, roads, creeks, coves, ports and rivers where the water flows and reflows."

An arm of the sea is considered as extending as far into the interior of a country as the waters of fresh rivers are propelled backward by the egress and pressure of the tide.

Bouvier's Law Dict. Def. Arm of the Sea.
Angell, Tide Waters, 2nd. Ed., 73.
7 Peters, 324.

In Johnson v. State, 47 Ala. 538, the court say: "There is a well recognized distinction between a river and a bay, the one being an inland stream and the other an inlet of the sea. Where the one begins and the other ends may often be a question of difficulty, yet, the two are legally and, in fact, essentially distinct."

Applying the above definitions to the waters in dispute in this case, the court will have no difficulty in finding that they constitute a bay.

14.

AN ESTUARY DEFINED.

This brings us to the question. What is an estuary?

Webster defines an estuary as "a narrow passage as the mouth of a river or lake where the tide meets the current: an arm of the sea."

The Century Dict. defines an estuary as "a channel extending from the sea; an arm or inlet of the sea; that part of the mouth or lower course of a river flowing into the sea which is subject to tides; specifically, an enlargement of a river or channel at its mouth in which the movement of the tides is very prominent."

The Supreme Court in Sloan v. Biemiller, 34 O. S., 513, applies the common law rule of fishing in bays and estuaries and say, "fishery in the sea and the waters which are made to flow inland therefrom by its egress and influence, constituting, as it does, a great source of sustentation, has in all ages and in all countries, been deemed of such importance that it has ever been regarded a privilege open and common to all persons."

That the waters in all of this territory rise and fall with the waters of Lake Erie; that the waters are made to flow inland by the egress and influence of the waters of the lake caused by the winds, is undisputed by the facts in this case.

15.

THE WATERS IN DISPUTE ARE NAVIGABLE.

The waters in dispute in this case are navigable for ordinary water craft and have been so used continuously for fifty years. (40) (56) (41) (45.) Scows sixty or seventy feet long and eigh-

teen to twenty feet beam, drawing from sixteen inches to three and one-half feet (284-289) have sailed over nearly all of Mud Creek Bay during all seasons of the year when there was no ice (285) and have "tacked" across Mud Creek Bay loaded with wood, cord wood, hickory butts, etc., (269-284-289 and 290) and sailed within twenty-five or thirty rods from the shore at an ordinary stage of the water (285-295.) There were both steam boats and sail scows (286-290-269.) The steamer "Dessault" hauled stone for the riprapping along the shores of the bay and sailed within twenty-five or thirty rods of the shore, and the stone were loaded on a lighter and unloaded on the shore (269.) Fishing boats of various sizes sail over all parts of the bay from shore to shore (269-284-290-295.) The undisputed depths of water throughout Mud Bay show that it is navigable.

16.

WATERS WHICH ARE NAVIGABLE IN FACT ARE NAVIGABLE IN LAW.

Waters which are navigable in fact are navigable in law.

Bernard v. Keokuk, 84 U. S., 324.
Hickok v. Hine, 23 O. S., 523.
Sloan v. Biemiller, 34 O. S., 511.

Not only have the waters of the bay in dispute always been used for purposes of navigation, but they are capable of use by the public for transportation and commerce.

The navigability of waters is not so much to be determined by the frequency of its use for that purpose as it is by its capacity of being used by the public for purposes of transportation and commerce.

Hickok v. Hine 23 O. S., 523-527.

The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of the river rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact and becomes, in law, a public highway.

Monticello, 20 Wall. (U. S.) 430-441-2.
Carter v. Thurston, 58 N. H., 104.
Diedrich v. Northwestern R. Co., 42 Wis., 248.
Broadway v. Baker, 94 N. Car. 675-681, s. c. 55 Am. Rep. 633.
Attorney General v. Woods, 108 Mass., 436.
Toledo Liberal Shooting Club v. Erie Shooting Club 90 Fed., 680.

In this case Judge Lurton says, "It is the capability of be-

ing navigated for useful purposes which is the test."

Packer v. Bird, 137 U. S., 661.
Jeremy v. Elwell, 5 C. C. Rep., 383.
Trout and Salmon Club v. Mather, 68 Vt., 338.

17.

FISHING IS COMMERCE, NAVIGATION IS THE MEANS BY WHICH IT IS CONDUCTED, AND NAVIGATION AND FISHING GO TOGETHER IN THESE WATERS.

Fishing in Lake Erie and its tributary waters, is commerce, and is conducted by means of navigation. The supreme Court of Ohio say, in Pollock v. The Cleveland Ship Building Co., 56 O. S., 668, "Clearly the term "easement of navigation" should not be construed in any narrow, scientific sense, but, having in mind the reservation of the easement by the state is for the benefit of the public in its use of the highway, should receive a construction in harmony with the nature of the uses of the water by the public, and the objects of a public nature, to be accomplished by such uses, etc."

Fishing is commerce and is carried on by means of boats, and navigation is the means by which it is conducted.

According to bulletin No. 16, issued by the United States Commission of Fish and Fisheries, for the year 1899, showing the magnitude of the fisheries of Lake Erie for the year 1899, there were four thousand men employed and an investment in fisheries of $2,719,654. That in Ohio, alone, there were more than two thousand men employed in fishing in Lake Erie and its tributary waters and an investment of $1,871,622.

There were fifty fishing steamers, sixteen transporting steamers, and 630 boats used in such commercial fishing in Ohio of the value of $308,497.00 and 48 pile drivers of the value of $22,705.00 and the catch in Ohio, alone, during the season amounted to 30,624,400 pounds of the value of $677,305.

In Lincoln v. Davis, 53 Mich. 375, Mr. Justice Campbell says, "Such fishing as is done with lines from boats in narrow streams cannot be complained of by riparian owners."

"The fish are like any other animal, ferae naturae, and in this region, have always been regarded as open to capture by those having a right to be where they are captured."

Judge Campbell says, in Sterling v. Jackson, 69 Mich., 518, "There was never any principal or practice which confined rights of travel on highways by land or by water to commercial purposes. Boats and vehicles are as lawfully used for pleasure and recreation as for any other purposes.

Both in England and in the United States, the fisheries are

always brought under the navigation laws."

In the most approved modern sense of the term in this country, navigable waters include all those which afford a channel for use for commerce.

Such waters are public highways of common right.

Am. and Eng. Encyc. of Law, Vol. 16, 236, and the several cases there cited.

But such commerce need not be conducted by means of boats and vessels waters which are capable only of floating rafts and logs are public highways for that purpose.

Am. and Eng. Encyc. of Law, Vol. 16, 242, and the many cases there cited.

It is not necessary for such waters to be fit for navigation at all times, but their capacity therefor must occur with regularity.

Walker v. Allen, 72 Ala., 456.
Thunder Bay River Booming Co. v. Speechly, 31. Mich., 336
Hogg v. Zanesville, etc. Canal Co., 5 Ohio, 410.
Olsen v. Merrill, 42 Wis., 203-212.
Holden v. Robinson Mfg. Co., 65 Me., 216.
Treat v. Lord, Me., 552.
Fulmer v. Williams, 122 Penn. St., 191.
Lancey v. Clifford, 54 Me., 489.

"He has no property in the water itself, but a simple usufruct."

Weiss v. O. I. & S. Co., 13 Ore., 496.
Scranton v. Wheeler, 57 Fed., 803.
I. C. R. R. v. Illinois, 146 U. S., 453.
Hardin v. Jordan, 140 U. S., 382.
Shively v. Bowlby, 152 U. S., 47.

"The character of the ownership of a riparian proprietor in lands forming the bed of the river is no greater than that of the State."

R. R. v. Platt, 53 O. S., 267.
Stockton v. B. & N. Y. R. R., 32 Fed., 20.

"Nor in the bed itself can the absolute rights of ownership be exercised by the possessor of the title."

Prosser v. N. P. R. R., 152 U. S., 64.
Gould on Waters, Section 140.
Hawkins Point Lighthouse Case, 39 Fed., 77.

"The principle clearly deducible is, that as to navigable rivers, the private right of the riparian owner to the land, ordinarily covered by water, is in all cases subordinate to the paramount right of navigation and its incidents."

Pollock v. The Cleveland Shipbuilding Co., 56 O. S., 666.

Fishing is an incident to navigation and could not be conducted without navigation.

Judge Campbell, in Lincoln v. Davis, 53 Mich., 392, says, "I can see no reason why open water fishing is not as essentially a maritime business as any other use of the water." And the Supreme Court of Ohio held in Bodi, et al. v. The Winous Point Shooting Club, 57 O. S., 233, "That the right of navigation and fishing go together in the lakes and navigable bays of this state, has been held by the court and seems settled." Fishing must be carried on by means of boats and is unquestionably a maritime business. Fishing could not be conducted in waters which are not deep enough to be navigable. (263-293.)

18.

ORDINANCE OF 1787.

The Ordinance of 1787, for the government of the North West Territory, of which the State of Ohio is a part, provided that:

"The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of said territory as to the citizens of the United States, and those of any other states that may be admitted into confederacy, without any tax, impost or duty therefor."

"The Ordinance of 1787 is as obligatory on us as our own Constitution, and even more so, for the Constitution can be amended."

Hogg v. Zanesville Canal and Mfg. Co., 5 Ohio, 410-416.

"This Ordinance applies, not only to the Great Lakes, but to all the streams discharging their waters into the lakes, or into the Mississippi and its tributaries, upon which had been floated, prior to the adoption of the Ordinance, the commercial products of the country. It must be remembered that this commerce then consisted mainly of fish and the skins of wild animals. It was an ordinance saving to the hunter and fisherman the right to navigate the waters, free of charge, and also preserved to him forever the right to fish and hunt upon them." Judge Morse in Sterling v. Jackson, 69 Mich., 530-531.

Houck on Rivers, Sec. 112.

19.

THE STATE OF OHIO HOLDS TITLE TO THE BED OF NAVIGABLE WATERS UPON A PUBLIC TRUST FOR THE PEOPLE OF THE STATE FOR NAVIGATION AND FISHING.

It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over

them, and have the liberty of fishing therein, free from the obstruction or interference of private parties.

Ill. C. R. R. Co. v. People, 146 U. S., 387.
McLennan v. Prentiss, 85, Wis., 427.
Arnold v. Mundy, 6 N. J. L., 1.

"The state holds title to the bed of navigable waters upon a public trust and no alienation or disposition of such property by the State, which does not recognize and is not in execution of this trust, is permissible."

Parker v. People, 111, Ill., 581.
Pollard v. Hagan, 44 U. S., 3 How. 212. (11:565)
Den v. The Jersey Co., 56 U. S., 15 How. 436 (14:757.)
Munford v. Wardwell, 73 U. S., 6 Wall., 423 (18:756.)
Weber v. State Harbor Comrs., 85 U. S., 18 Wall., 57.
McCready v. Virginia, 94 U. S., 391.
Barney v. Keokuk, 94 U. S., 324.
Manchester v. Massachusetts, 139 U. S., 260.
Hardin v. Jordan, 140 U. S., 371.
Smith v. Rochester, 92 U. S., 463.
Illinois Steel Co. v. Bilot, et al., 109 Wis. 418.

It cannot sell to them so as to deprive the public of their enjoyment.

Miller v. Munderhall, 8 L. R. A., 89 S. C., 43 Minn. 95.
Boston v. Richardson, 105 Mass., 351.
Mather v. Chapman, 40 Conn., 382.
Gould on Waters, 382.

The Supreme Court of Ohio say, in the case of Hogg v. Beerman, 41 O. S., 81, "Land covered by the water of a navigable land locked bay or harbor connected with Lake Erie, may be held by private ownership, subject to the public rights of navigation and of fishery, provided the holder derives his title from the express grant made or sanctioned by the United States." This case was followed and approved in The East Harbor Sportsman's Club v. Kelting, et al., 37 W. L. B. 259, 56 O. S., 746, and again in Bodi v. The Winous Point Shooting Club, 57 O. S., 226.

The court further say, in Hogg v. Beerman, 41 O. S., 95, "Where the grantor is the government, the thing granted government property held by absolute title, and no use "of thing granted to which the public is entitled is taken away, etc., (the public rights of navigation and fishing were the uses to which the public were entitled,) and on page 98 the court say, after following and approving the case of Sloan v. Biemiller, 34 O. S., 514, "the right of fishing in Lake Erie and its bays is as open to the public as if they were subject to the ebb and flow of the tide." "No mere grant of the land covered by such waters destroys this public right."

20.

THE FISH IN THE WATERS OF THE BAY ARE HELD BY THE STATE OF OHIO IN TRUST FOR ALL PEOPLE AND PLAINTIFF IN ERROR HAS NO PROPERTY IN THEM.

Fish are animals ferae naturae and plaintiff club has no property in the same until they are subjected to their control.

Parker v. People, 111, Ill., 588.
Magner v. People, 97 Ill., 320.
Lincoln v. Davis, 53 Mich., 375.
Moulton v. Libby, 37 Me., 427.
Packard v. Ryan, 144 Mass., 440.

The ownership of fish is held by the Sovereign authority in trust for all the people of the State.

14 Am. and Eng. Encyc. of Law, 655.
Roth v. State, 51 O. S., 209.

21.

THE SAID WATERS WERE NOT SURVEYED AS SANDUSKY RIVER AND MUD CREEK, BUT AS A PART OF SANDUSKY BAY, AND THE UNITED STATES DID NOT CONVEY THE SAME AS A RIVER AND CREEK AND COULD NOT HAVE SOLD SUCH WATERS SO AS TO EFFECT THE PUBLIC RIGHTS OF NAVIGATION AND FISHING.

Plaintiff's counsel contend that the United States sold the waters in dispute as Sandusky River and Mud Creek and that, therefore, they became the owners of this bay by reason of the sale of the fractional sections surrounding the bay and that such title extended to the middle of the streams.

This contention is wholly unsupported by the evidence in the case and is clearly contrary to law. Plaintiff bases this connection upon the Bourne Survey of 1820.

The court will observe, upon examination of this survey, both in Sandusky and Ottawa Counties, that the surveyor did not mention all the waters in his field notes, but that he has designated them upon his map. Parts of the Sandusky River and Muddy Creek, running through sections 29, 30 31and 32, are there designated as Sandusky River and Muddy Creek.

The Act of 1796 required the surveyor to note in his field

book, the situation of mines, salt licks, salt springs, mill seats, watercourses and the quality of the lands. It will be noticed that the surveyor was not required to note either Mud Creek or Sandusky Bay; but, upon his map of Township No. 6, he prints the names of Muddy Creek, Sandusky River, Green Creek, South Creek, Raccoon Creek, Sandusky Bay and Pickerel Creek, and clearly shows that all of the creeks empty into the bay except Green Creek. He designates Sandusky Bay in very large letters upon his map so that there can be no presumption that he even thought that this great bay was a part of Muddy Creek and the Sandusky River.

The court will observe that upon the Ottawa County map the surveyor commenced at an elm in the south-east corner of section 12 and designated it as "1" upon the map. The court will see that the south-east corner of section 12, which is at least one and one-fourth miles east of Slade's Point, (The point where plaintiff club contends the mouth of the Sandusky River should be.) is upon the shore of Sandusky Bay. The surveyor then proceeded westerly along the shore of Sandusky Bay to "2," an elm. He then proceeded south-westerly along the shore of fractional section 13 to "3," a post in wet prairie. (The distance run so far is upon the shore of Sandusky Bay, according to plaintiff's own contention.) The surveyor then continued the survey around the shore of the bay along the shore of fractional sections 23, 22 and 21. Looking at the Sandusky County Map, the court will observe that Sandusky Bay is also included in the survey the same as that in Ottawa County; the township lying immediately east of the aforesaid township is surveyed precisely the same; part of the land in the township lying on the north side of the bay and part on the south side. There is, therefore, absolutely no evidence that the United States sold the waters in dispute in this case as a river or a creek, but on the contrary, the evidence is conclusive that these waters were meandered as a part of Sandusky Bay. Plaintiff's further contention that the United States granted these lands as such river and creek is wholly unsupported by the evidence. There is not a patent deed in the case. The only deeds are those from plaintiff's immediate grantors which only purport to convey the fractional sections surrounding the bay. The record discloses that much of the land within the sections and fractional sections surrounding the bay was acquired under the State Swamp Land Acts (Rec. 29-30.) And there is nothing in the record to show that any of the lands in said sections or fractional sections were otherwise conveyed, except the erroneous conclusion of the Circuit Court as to lands patented from the government, which is not supported by any evidence.

Each state adopts its own rules as to the ownership of the soil beneath the navigable waters of the state, and by the great weight of authority in the United States, the soil beneath the

navigable waters is not subject to private ownership; and if plaintiff's contention is true, the states which have adopted the rule which does not permit of private ownership of the soil beneath the navigable streams, have all violated their theory.

The only direct adjudication of the public right of fishery in the navigable waters of the state, be they rivers or bays, is that of Sloan v. Biemiller, 34 O. S., 513, wherein the court holds that fishery in the sea and in the waters which are made to flow inland therefrom by its egress and influence, constituting as it does, a great source of sustentation, has in all ages and in all countries been deemed of such importance that it has ever been regarded as a privilege open and common to all persons.

The defendants contend that this decision applies to so much of the rivers of the state as rise and fall with the waters of the lake and bay and the fact in this case is undisputed that the waters of the territory in dispute rise and fall with the waters of Sandusky Bay which rise and fall with the waters of Lake Erie.

The right to fish is mentioned in the case of Gavitt v. Chambers, 3 Ohio, 498, which is the case which first laid down the rule of riparian ownership in Ohio and we submit that in that case the words "right to fish" were mere dictum

The Supreme Court of Ohio say, in the case of June v. Purcell, 36 O. S., 396, in the first paragraph of the syllabus "The principal decided in the case of Gavitt v. Chambers, 3 Ohio, 495, that the owners of land situated on the banks of navigable streams running through the state are also the owners of the beds of rivers to the middle of the stream, as at common law, has become a rule of property, and irrespective of the question of its original correctness, ought not to be disturbed. We contend, therefore, that even though the territory in dispute in this case were a part of a navigable river and creek, which rises and falls with the waters of the lake and bay the public right of fishery would exist irrespective of the ownership of the soil.

Hogg v. Beerman, 41 O. S., 81.
The East Harbor Sportsman's Club v. Kelting, 37 W. L. B., 259. 56 O. S., 746.

22.

CONCLUSION.

There is no question that more concerns the public than an abundant supply of cheap food. It is the basis of the happiness, prosperity and contentment of all people, and the sources of its supply are matters of the highest public concern.

By Section 6968-2, Revised Statutes of Ohio all persons engaged in catching fish for profit in the waters of Lake Erie or in the estuaries or bays thereof in Ohio, are required to pay

a license fee and a tonnage tax to the Fish and Game Commissioners of the State for the purpose of providing for and establishing and maintaining fish hatcheries and necessary expenses incident thereto.

The legislature of Ohio appropriated $43,000.00 for the use of the Fish and Game Commission.

The State has established a fish hatchery at Lakeside in Ottawa County and the United States has established one at Put-in Bay in the same county.

Both of these hatcheries are propogating fish at the public expense and placing them in the waters in question and in Sandusky Bay and Lake Erie.

Are the State of Ohio and the United States propogating fish at the expense of the public and placing them in these waters for the exclusive use and control of this sporting syndicate, that its members may have the exclusive pleasure and profit of capturing them, under a pretended claim of riparian ownership in this great bay?

Are these waters to be replenished year by year at the expense of the public, and the great mass of the people who bear the burden of such expense, and to whom the right of fishing for a livelihood or for pleasure is as important and as dear as is can be to any member of this sporting club, and the fisherman who pay the license fees and tonnage tax, to be perpetually enjoined from catching fish in these waters, and this grat bay, in which commercial fishing has been carried on from the time of the early settlement of the country, be turned over to the sporting club and be converted into a private fishing ground for the exclusive use of plaintiff in error, when it is clear both from the evidence and the law that it does not own it and has not been in possession of it and could not own it under any condition except it be held in trust for all the people of the State for navigation and fishing? We think not. Fishing in these waters is a public trust held by the state of Ohio for all its people and not the subject of monopoly by plaintiff in error.

Respectfully submitted,

GEO. A. TRUE,

Attorney for Defendants in Error.

Supreme Court of the United States.

No. 153.—October Term, 1903.

The Winous Point Shooting Club, Plaintiff in Error,
vs.
Jeppe Caspersen, Peter Petersen, William Decker and Charles Petersen.

In error to the Supreme Court of the State of Ohio.

[March 7, 1904.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

This was a suit brought by the Winous Point Shooting Club against Caspersen and others in the Court of Common Pleas, Ottawa County, Ohio, to enjoin defendants from fishing on certain premises alleged to be parts of Sandusky River and Mud Creek and to belong to plaintiff.

The court found that the waters in dispute formed part of a public bay, which defendants had the right to navigate and to fish in; and dismissed the petition.

The case was then carried to the Circuit Court of Ottawa County and there tried *de novo*. That court filed findings of fact and conclusions of law; held that the waters in question were not parts of Sandusky River and Mud Creek, and formed part of a public bay, in whose waters defendants as members of the public had the right of navigation and fishing; and the petition was again dismissed. Plaintiff then took the case on error to the Supreme Court of Ohio, and, with other alleged errors not material here, assigned as error that "the judgment of the court is in contravention of section 19, article I, of the constitution of Ohio, and article 5 of the Constitution of the United States, in that by said judgment the private property of the plaintiff in error is taken for public use without just compensation." There was no suggestion that any right under the Constitution, or any statute of, or authority exercised under, the United States, had been specially set up or claimed, and decided against. The Supreme Court affirmed the judgment of the Circuit Court and entered an order certifying as "part of the record in this case and of the judgment and entry of affirmance heretofore rendered and made herein, that in the prosecution of error to this court from the Circuit Court of Ottawa County, and in the arguments made in this court, in behalf of plaintiff in error, it was insisted and relied upon by said plaintiff that the waters in dispute had been surveyed and meandered by the United States as those of Sandusky River and Muddy Creek, and the lands mentioned

and described in said case had been surveyed, sold and patented by the United States to plaintiff's predecessors in title as lands bordering upon said river and creek, all of which acts had been done under authority of acts of Congress; that plaintiff had and possessed the sole and exclusive right of fishing in said waters; that the judgment and decree of the said Circuit Court, that said waters are not those of Sandusky River and Muddy Creek, but those of an open and public bay, in which the public had the rights of fishing, was in contravention of the Constitution of the United States, in that plaintiff was deprived of its private property and the same was taken for a public use, without just compensation to it; and it became material to the determination of said case in this court to determine said question so made by plaintiff in error, which was determined adversely to plaintiff in error, as appears in the entry and judgment of affirmance heretofore made herein."

The certificate in itself would not confer jurisdiction, but may properly be referred to, and it appears therefrom as well as from the terms of the assignment of error in the Supreme Court that plaintiff's contention was that the judgment of the Circuit Court was in violation of the Fifth Amendment. But that amendment is a restriction on Federal power, and not on the power of the States. The Supreme Court of Ohio gave no affirmative expression of its views in that regard, or, indeed, in respect of section 19 of article I of the constitution of Ohio, treating of taking private property for public use on compensation made.

The judgment was affirmed on the authority of *Bodi* v. *Winous Point Shooting Club*, 57 Ohio St. 226. In that case the same waters were in dispute as in this case, and it was held that they formed "part of a public bay and not parts of the Sandusky River and Mud Creek," and the ruling in *Sloan* v. *Biemiller*, 34 Ohio St. 492, sustaining the public rights of navigation and fishing, in such circumstances, was followed and approved.

Federal questions cannot be raised here which did not arise below, and as the Fifth Amendment had no application the averment of its violation created no real Federal question. *Chapin* v. *Fye*, 179 U. S. 127.

Writ of error dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.